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The twenty-second annual meeting of the American Bar Association held at Buffalo, August 28th to 30th, was in every respect satisfactory. Both in attendance and in interest it gained some advantages from the fact that the International Law Association was to meet at the same place immediately after the adjournment of the Bar Association. Two members of the International Law Association were on the programme of the Bar Association, and read some excellent papers. One, by Sir William R. Kennedy, is further mentioned below, and the other, by Joseph Walton, Q. C., was an historical sketch of the education of English lawyers in earlier days. In the absence of Joseph H. Choate, the president of the association, ex-Senator Manderson of Omaha presided with exceptional skill. His opening address was an admirable review of the changes and development of the law during the past year. The power of the United States to acquire and hold foreign territory was discussed by Senator Lindsey of Kentucky, who reached the conclusion that such power is undeniable. Even those who did not agree with his conclusion agreed that the address was remarkable for its ability. Edward Q. Keasbey of New Jersey reviewed the legislation of his State on the subject of corporations, to show that the liberal policy of New Jersey toward corporations had long been established, and that the recent incorporation there of mammoth trusts was not due to any innovation or change in New Jersey law, but was due rather to the fact that her policy has continued the same while that of other States has changed.

One of the subjects touched upon by the president of the American Bar Association, in his address, and later acted upon by the association was the proposed celebration of the centennial anniversary of John Marshall's appointment as Chief Justice of the United States Supreme Court. The idea—a happy and patriotic one—seems to have originated with Mr. Adolph Moses of the Chicago bar. The Illinois State Bar Association at its late meeting quite enthusiastically adopted the

suggestion and passed a resolution to be presented by its delegates to the American Bar Association, proposing that February 4th, 1891, be called "John Marshall Day," and that by the united action of congress, the courts, the executive departments and the bar, the people may "commemorate the great event which gave to the United States the powerful mind of Marshall, and harmony and strength to the great instrument, the constitution of the United States." "Such a celebration," says Mr. Manderson, "will add to our respect for law and for those who maintain the purity of the judiciary, which Marshall said 'comes home in its effects to every man's fireside and passes on his property, his reputation, his life, his all. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary.' Let us not bring upon ourselves this scourge by the sin of ingratitude, but, rejoicing in the beneficent career of our greatest jurist, thank God for him and revere his memory. I hope that by appropriate action the American Bar Association may fittingly supplement that of the State of Illinois."

John Marshall, the "Expounder of the Constitution," ascended the bench of the Supreme Court of the United States, as the third chief justice, one hundred years ago the coming 4th day of February, 1801. From the day of entrance upon the performance of the grave duties and formative functions of his exalted place to July 6th, 1835, a period of thirty-four years, six months and two days, he gave to the people and posterity the devoted, earnest effort of a master mind. Serving with honorable distinction as a soldier during the Revolution; with signal ability as member of the congress, secretary of the state and as envoy to France at a most critical period, his arduous and painstaking labors for the young republic won the respect, admiration and gratitude of all. Active and influential in securing the adoption of the constitution, when he came to the great position where he was to construe its meaning and give vital force and sustaining effect to its terms, he brought to the performance of the important duty a clearness of vision, an honesty of purpose, a calm, deliberate judgment

and a judicial courage unequalled in the annals of jurisprudence.

It has been well said: "He found the constitution paper and he made it power; he found it a skeleton and clothed it with flesh and blood." Chief Justice Waite, speaking of him, said: "With his irresistible logic, enforced by his cogent English, he developed the hidden treasures of the constitution, demonstrated its capacities, and showed beyond all possibility of doubt, that a government rightfully administered under its authority could protect itself against itself and against the world." The proposed centennial celebration certainly appeals to the patriotism as well as the intelligence of that great profession which, since the era of civilization, has been charged with the duty of guarding the liberties and the property rights of the people and treasures the memory of the great chief justice.

NOTES OF IMPORTANT DECISIONS.

DIVORCE—ALIMONY—PROFESSIONAL EDUCATION OF SON.—In *Streitwolf v. Streitwolf*, decided by the Court of Errors and Appeals of New Jersey, it appeared that in a suit brought by a wife for a limited divorce on the ground of extreme cruelty, alimony *pendente lite* was awarded her. She subsequently applied for additional alimony *pendente lite*, to enable her to meet the expense for tuition and books, at a law school, of her son, then in his twentieth year, who lived with, and was chiefly supported by, her. No order had been made giving the custody of the son to either parent. The application was granted, against the opposition of the husband, who testified that he thought his son unfitted for the law, and wished him to go into business. It was held that the order giving additional alimony *pendente lite*, to enable the wife, against the judgment of her husband, to secure for the son a professional education, should be reversed. "Whether a young man," say the court in the course of its opinion, "shall study a profession is a question usually determined for him by his parents, especially by his father, with some reference to the son's taste and capacity. It is not well for courts to assume unnecessary responsibility in the critical matter of choosing a profession, as to which even the persons most deeply interested and best qualified to judge are not free from liability to error, or to stand *in loco parentis* before the *locus parentis* has been vacated or forfeited by the death, disability or misconduct of the rightful incumbent. It may be further observed that the courts, in determining the amount of alimony, have had regard to

the age and earning capacity of the minor for whose support and education the wife asks an allowance. In *Snover v. Snover*, 13 N. J. Eq. 261, it was directed by Chancellor Green that so much of an award of permanent alimony as was designed for the support of a daughter should cease when she should reach the age of 18. In *Amos v. Amos*, 4 N. J. Eq. 171, Chancellor William Pennington said: "Where children are grown up it is not proper to make an allowance on their account," having evidently in mind their arrival, not at legal majority, but at a condition of earning capacity. Again, it is to be remembered that the courts are disposed to recognize and enforce proper agreements *inter partes* touching the support of a wife. *Calame v. Calame*, 25 N. J. Eq. 548. Moreover, it may be material to inquire whether the court has awarded to the wife the custody of the minor child who lives with her, and the cost of whose support she asks to have included in her award of alimony. This is so because in the case of a grown-up child the father's duty to furnish support and the child's duty to render service are usually reciprocal."

TRIAL—MISCONDUCT OF JURY.—In *Saltzman v. Sunset Telephone & Telegraph Co.*, 58 Pac. Rep. 169, decided by the Supreme Court of California, it was held that where a juror was permitted to go to the telephone and communicate with persons unknown to the deputy in charge of the jury, evidence that the communication was very brief and that the deputy heard what the juror said, and the affidavit of the juror himself setting out the nature of the communication, are sufficient to rebut the presumption that undue influence was brought to bear on him. The court said in part: "The question still remains to be considered whether the communication by the juror Krumb over the telephone with some person outside was such misconduct as should induce the court to vacate the verdict. This fact is shown by the affidavit of the deputy sheriff who had charge of the jury. It is to be considered solely in connection with the facts found in this affidavit, and without knowledge of how Krumb had previously voted. The deputy, in violation of his sworn duty, permitted Krumb, while the jury were dining at a restaurant, to which he had taken them in obedience to an order of the court, to leave the table and go to a telephone receiver, which was apparently in the same room, and call someone, no doubt at the central office, which was in charge of the defendant in the case. The deputy went to the receiver with him. He heard him ask through the telephone for his father-in-law, and tell someone to have his father-in-law call him, as he would probably stay out all night—that he was then at the restaurant. He was afterwards called up, and again went to the telephone, the deputy going with him. He heard Krumb tell his father-in-law that he would probably be kept out all night, and asked him to take care of his horse. Krumb said nothing about the

case, and, though the deputy was produced for examination by the appellant, nothing was shown which was calculated to raise a suspicion that any communication was had with anyone about the case. With the deputy standing by his side while giving this very short and simple message, it could easily be told whether there was further conversation. The affidavit of Krumb was also read in explanation. He says he called one Hobson to go for his father-in-law, and also to a clerk in his own store, and asked him to close up at the usual time, and that he was called up by his father-in-law, and asked him to take care of his horse and chickens, to which his father-in-law assented. He had no further communication with anyone, and nothing was said about the case at all. It is agreed that, while the affidavit of a juror cannot be used to impeach a verdict, it is perfectly competent to explain or to deny alleged misconduct or interference with the jury. It is contended that the conduct of Krumb was a separation from the jury under such circumstances that improper communications could have been made to him, and in the nature of things there can be no conclusive evidence upon the matter save his own. Communications through a telephone, it is said, are especially dangerous. A telephone in a jury room takes the ear of the juror abroad secretly for any corrupt proposition a party may desire to send. Appellant contends that the affidavit of a juror cannot be used to show that he has not been corruptly approached where he has improperly separated himself from the jury under such circumstances that an attempt to corrupt might be made. As authority he cites *People v. Backus*, 5 Cal. 275; *People v. Thornton*, 74 Cal. 484, 16 Pac. Rep. 244, and *People v. Stokes*, 103 Cal. 193, 37 Pac. Rep. 207. In criminal cases our statutes have always provided, as now by section 1181 of the Penal Code, that a court may grant a new trial 'when the jury has separated without leave of the court, after retiring to deliberate upon their verdict.' There is no such ground for granting a new trial in a civil case, except under the ground of misconduct of the jury 'materially affecting the substantial rights of a party.' The force of the decision in *People v. Backus* has been somewhat weakened by *People v. Bonney*, 19 Cal. 427; *People v. Symonds*, 22 Cal. 349, and *People v. Brannigan*, 21 Cal. 338. The matter is fully discussed in a note to *McKinney v. People*, 43 Am. Dec. 65. The annotator says it is almost the universal rule that, in order to set aside the verdict, 'there must be some evidence of other misconduct in addition to the mere fact of separation, which has operated to the party's prejudice.' The rule in this State, I take it to be, in civil cases, that a separation, against the instruction of the court, with evidence that improper influence might have been brought to bear upon the juror, puts the burden upon the party seeking to sustain the verdict to negative the presumption, and show that no such attempt was made. I think that was done in this case. The brevity of the communication,

the presence of the deputy, who could hear what was said by the juror, and the affidavit of the juror, rebut the presumption of injury. Still, I am impressed with the argument as to the particular impropriety of allowing a juror to communicate by telephone. Both the juror and the deputy were guilty of gross impropriety. The juror should have obtained permission from the court to send a message, and the deputy should have been at the receiver. The judgment and order are affirmed."

WITNESS—IMPEACHMENT.—In *Lodge v. State*, 26 South. Rep. 210, the Supreme Court of Alabama held that to impeach a 14-year-old witness in a criminal case, who is under the control of his parents, evidence that ill-will and bad feeling existed between accused and the parents of the witness, and that the latter's father, who had instituted the prosecution, had commenced another criminal prosecution against accused, all of which was known to the witness, is admissible. It was further held that evidence tending to impeach the person who instituted the prosecution and his wife is inadmissible in a criminal case, where neither of them was a witness, though their 14-year-old son testified against accused. The court said in part: "The defendant was tried and convicted of carrying a pistol concealed about his person. The prosecution began upon a warrant issued upon the affidavit of one Otto Gordon. Otto Gordon, who was the principal witness for the State upon the trial of the defendant, was a boy 14 years of age and the son of Mr. and Mrs. A. Gordon. The defendant sought to prove by this witness, on cross-examination, ill-will and a state of bad feeling on the part of both M. Gordon and Mrs. A. Gordon toward the defendant. This testimony was objected to by the State on the ground that it was irrelevant and immaterial, and the objection was sustained. The defendant also sought to prove by this witness, as tending to show ill-will on the part of M. Gordon, the father, toward the defendant, the fact of a prosecution then pending against the defendant, commenced on affidavit of M. Gordon, charging him with adultery with one Belle Turner, which evidence was objected to by the State, and the objection was sustained by the court. That it is competent to show the state of feeling of a witness when called to testify cannot be doubted, the purpose being to give the jury all of the facts necessary to a full and fair consideration of his evidence, and to enable them to determine the degree of credit to be accorded the same. It was decided in *Prince v. State*, 100 Ala. 144, 14 South. Rep. 409, that it was competent for the defendant, in a prosecution, to show that the employer of a witness testifying in behalf of the State, against the defendant, was taking interest in the trial of the case, the court using in that case the following language: 'In weighing testimony, the jury ought to be in possession of all facts calculated to exert any influence upon the witness. It cannot be said, as a conclusion of law, that an

employee testifying in a matter in which he knows his employer is interested personally or pecuniarily is or is not wholly unbiased. It is proper for the jury to know the character of the interest of the employer, how it is to be affected, and in what way it is manifested. An employer may act from a sense of public duty, or be interested in seeing that another has a fair trial; or it may be that he is actuated by pecuniary interest, or a spirit of revenge, or vindictiveness, and may use his position as employer to bias the evidence of his employee. We think it safe to hold that when an employee is testifying it may be shown that his employer is interested in the prosecution.' While it cannot be stated as a conclusion of law that, when a son of tender years testifies against a party toward whom his parent entertained ill feelings, his testimony would or would not be wholly unbiased, nevertheless, it being but natural for the child to be more or less impressed with the sentiments and feelings of the parent, it is proper for the jury to be informed as to the state of bad feeling of the parent toward the defendant, if it be a fact, and such state of feeling is also known to the child. We think the reasoning for the admissibility of evidence of this character is more cogent in the case of a child who is under parental care and control, testifying as a witness, than in the case where the relationship is only that of employee and employer. This evidence should have been allowed, and the court erred in sustaining the solicitor's objection."

GAMING — ILLEGAL CONTRACTS.—In *St. Louis Fair Association v. Carmody*, 52 S. W. Rep. 365, decided by the Supreme Court of Missouri, it was held that where plaintiff, in addition to conducting lawful races had arranged booths and appliances for gambling on the races, a contract with defendant whereby he was to furnish refreshments, thus increasing the attractions and promoting the gambling is illegal and void. The court says: "Under the law of this State, it is not unlawful to keep a race track, and to induce horse races thereon by giving prizes to the winners. And it is not unlawful, under license, to provide stands to dispense refreshments to persons attending the races, making it more attractive to patrons of the race track, provided there is no ulterior consideration entering into the transaction, of an unlawful character. But betting on a horse race is gambling. *Shropshire v. Glascock*, 4 Mo. 536; *Boynton v. Curle*, *Id.* 600; *Hayden v. Little*, 35 Mo. 418. And keeping a gaming house furnished with the means and facilities for gambling, to which the public is tempted, invited, or permitted habitually to attend for the purpose of gambling, whether it be by betting on a horse race in sight or at a distance, is the keeping of a common gambling house, within the meaning of the law. *Bollinger v. Com.*, 98 Ky. 574, 35 S. W. Rep. 553; *People v. Whelthoff*, 51 Mich. 203, 16 N. W. Rep. 442. In the former case, just cited, the Supreme Court of Kentucky said:

'That a house where persons are permitted to assemble to bet and win or lose money, whether with each other or with the owner, or whether on result of a horse race or turn of a playing card, is, in meaning of the law, a gaming house, and therefore a common nuisance, is too well settled and plain for discussion.' And in the Michigan case Judge Cooley said: 'The characteristics of such a room must be readily apprehended and understood. If the room is one whose use is intended to facilitate gaming operations, and where sporting characters are invited to congregate for purposes of illegal amusement and gain, and to stake money or other thing of value upon trials of chance, skill, or endurance, we seem to have everything necessary to constitute a gaming room.' In *Swigart v. People*, 154 Ill. 284, 40 N. E. Rep. 432, the plaintiff in error was indicted and convicted of keeping a common gaming house, under a statute similar to ours. He was the secretary of the Garfield Park Club, which kept a race track near Chicago. A part of the revenue of the club was obtained from space and privileges rented to bookmakers and pool sellers. This space was located under the grand stand. It was covered, but open on the sides. The following are extracts from the Illinois court in that case: 'That bookmaking and pool selling are each betting upon the horse race or particular event upon which they are made or sold, is not questioned. In the first, the betting is with the bookmakers; in the second, the betting is among the purchasers of the pool. * * * It is shown that large numbers of persons were present and permitted to assemble within said room within the racing season, who did bet upon the result of the races. * * * It is clear, therefore, that the room or space within the grand stand within the inclosure of said Garfield Park Club, kept, as we have seen, for the purpose of bookmaking and selling of pools contingent upon the result of horse races,—the seller or buyer of the pools winning the money wagered upon the race, or losing it,—was a common gaming house, within the meaning of the statute. * * * That drawing together of large numbers of persons, from all classes of society, in and about the betting rooms and betting rings of the Garfield Park Club, so that they were brought into familiarity with gambling in its various forms, as there practiced, was demoralizing, can admit of no question; and that the keepers of the places where persons were procured or permitted to assemble together for the purpose of betting and winning and losing money falls within both the letter and spirit of section 127 of the Criminal Code, admits of no controversy.' The keeping of such a house being forbidden by law, any contract made in furtherance of the purpose for which it is kept, or to render it more tempting or attractive to the public who would patronize it for that purpose, is illegal, and courts will not enforce it. It makes no difference how fair the contract may be on its face, or how innocent in its own isolated terms; if it is designed to encourage an object forbidden by

law, the courts will have nothing to do with it. *Downing v. Ringer*, 7 Mo. 585; *Ashbrook v. Dale*, 27 Mo. App. 649; *Friend v. Porter*, 50 Mo. App. 89; *Sprague v. Rooney*, 104 Mo. 358, 16 S. W. Rep. 508. In the case last cited this court, per *Sherwood, J.*, said: 'If there is one principle of law well settled, it is this: * * * That, the moment the illegality of the contract is disclosed, the gates of legal and equitable relief and remedy are at once shut against the party who seeks to enforce such a contract.'

"The learned counsel for respondent, referring to the cases above cited, in their brief say: 'The case at bar is very different from any of these. Here was a public race course, the maintenance of which was not in violation of law. Races may lawfully be run, and purses may lawfully be paid to winners. People may attend to witness races, and their attendance is not in violation of law. Betting upon these races is unlawful, but that does not interfere in the racing; and so the agreement to pay the purses would be enforced at the suit of the winners, because in that agreement there was nothing in contravention of law or public policy. Men are employed to care for the horses, blacksmiths are engaged to shoe them, but that there is betting upon the races does not taint their work with illegality. The contract with the defendant was for the right to sell refreshments upon the ground, to whomsoever desired them,—not alone to those who attended for the purpose of wagering, but without regard to the purpose of their attendance.' But that statement does not compass the whole case. To it should be added that the betting booths were a part of the plaintiff's race-track scheme, from which, by sales, to be used for bookmaking, the plaintiff derived revenue, and that the object of providing refreshments was in aid of that scheme. A scheme lawful in itself cannot be made a cover for one that is unlawful. The plaintiff's race track and grand stand were lawful to be kept, but when it adds to those the gambling booth, and runs them together, and then makes a contract that is appurtenant to either and appurtenant to both, courts will not entertain it merely because, in its application, it was not limited entirely to the unlawful purpose. 'If the house in question has been opened and used for a double purpose, viz., as an honest social club for those who did not desire to play, as well as for the purpose of gaming for those who did, it would not the less be a house opened and kept for the purpose of gaming.' *Jenks v. Turpin*, 13 Q. B. Div. 505. See also *White v. Wilson's Admrs.* (Ky.), 38 S. W. Rep. 495. The argument on the part of respondent is that, since the selling of refreshments on a race track is an act in itself not unlawful, selling the privilege to do so is not unlawful, and, the contract of sale of the privilege being thus lawful as between the seller and the buyer, it is not rendered unlawful because some persons may see fit to bet on the races. There is no disputing of that proposition in the abstract, and it may be carried further, and this be added:

That the contract, under those circumstances, would not be rendered unlawful, although at the time of making it the parties knew that persons were liable to bet on the races. But if the parties made the contract in contemplation of the business the plaintiff was to conduct,—both that which was lawful and that which was unlawful,—and the subject of the contract was a feature of that business, and designed to promote it, the contract is unlawful. A contract lawful in itself cannot be rendered unlawful by the act of a third person converting the subject of the contract to an unlawful purpose, but, if the contract apparently lawful was made with a view to facilitate or encourage the unlawful act of a third person it is unlawful. In *Michael v. Bacon*, 49 Mo. 475, relied on by respondent, the suit was on account for labor and material furnished in papering a house on Fourth street, in St. Louis. The defense was that the house was furnished for the purpose of using it for a gambling house, and that plaintiff knew it. This court said that, while there was evidence to show that plaintiff knew the purpose for which the house was intended, yet 'there was no evidence that the plaintiff's purpose in supplying the materials and fitting of the house was that it should be used as a gambling house,' and held that he was entitled to recover. It is therefore not the unlawful use to which the subject of the contract is liable to be put, but the intention of the parties that it be so used, that vitiates the contract. The court in that case refers to *Pearce v. Brooks*, 1 L. R. Exch. 213, and it says of it: 'The point made in that case was that a man who hired a brougham to a prostitute, and knowing that she was a prostitute and knowing that she intended to use the brougham for purposes of display and attraction, could not recover for the hire, because such knowledge in that case amounts to an intention or design on his part to aid the prostitute in her illegal calling.' Since, as we have seen, the plaintiff's business as a race-track proprietor has two branches,—one lawful and the other unlawful,—and since the subject of the contract in suit relates as well to the one branch as the other, we are justified in leaving out of view its relation to that part of plaintiff's business which is lawful, and consider it only in its relation to the unlawful branch. In that respect, it is simply a contract of sale by plaintiff to defendant of the privilege of selling liquors, cigars, and other refreshments to the patrons of plaintiff's gambling house during the racing season. In that aspect, it is as much unlawful as if the keeper of a bawdy house had sold the privilege to furnish like refreshment to the patrons of her house. The law makes no difference in the two kinds of establishments."

LIABILITY OF SUBSCRIBERS FOR UNPAID CAPITAL STOCK.

The facility with which corporations have allowed their corporate powers to be used by scheming speculators to contract debts that could not be collected, has of late years attracted the attention of both courts and legislatures, and strenuous efforts are now being made by judges and legislators to curb this immoral tendency in corporations. The unhappy condition of the creditors of large corporations which fail without assets has won the sympathy of our courts, and they are now holding the stockholders of corporations to as strict liability as possible to their obligations. It is our purpose to discuss briefly the trend of decisions of our courts upon the question of the liability of stockholders upon their subscriptions to the capital stock of corporations.

In the case of *Minneapolis Threshing Machine Co. v. Davis*,¹ the court held that "a subscription by a number of persons to the stock of a corporation to be thereafter formed by them, has, in law, a double character: First, it is a contract between the subscribers themselves to become stockholders, without further action on their part, immediately upon the formation of the corporation. Second, it is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes, as to each subscriber, a contract between him and the corporation."

The subscription to the capital stock of a corporation being a contract, the terms of the subscription cannot be varied by parole,² nor can the subscriber defeat the recovery of the amount due for his stock on the ground that he attached a secret oral condition to the delivery of his subscription to the promoter.³ However conditions which the corporation

may, by its laws, sanction, may be incorporated into subscriptions, made after the corporation has been organized.⁴ But a subscription which provided that the assessments on the stock should not exceed 40 per cent. of the par value, and that when that per cent. of the par value of the shares shall have been paid in the shares should be issued as full paid stock, is void, and the subscriber will be held for the full amount in case the corporation becomes insolvent.⁵ In *Coffin v. Ransdell*,⁶ it was held that "any arrangement between a stockholder and the officers or agents of a corporation, by which paid up shares are issued upon merely simulated or nominal payments, whether such payments are made in money or property, is regarded, as between the stockholders and the creditors of the corporation, as a sham, and hence no payment at all. Such payments, like simulated subscriptions, are an evasion of the law, and are, therefore, fraudulent and void."

Simulated or feigned subscriptions by persons who have neither the ability nor the intention to pay them, and arrangements between the subscriber and the agents or promoters of a corporation, that subscriptions should be merely colorable, are a fraud upon the law.⁷ Thus, a promoter's promise that the subscriber shall not be called upon for payment of the shares of stock subscribed for by him, will not avail as a defense in an action to recover the unpaid subscription;⁸ and an agreement between a subscriber and promoters, that the former was to have his stock for the use of his name, is void, and will not be a defense in an action upon his subscription;⁹ nor will the fact that such a secret agreement existed among some of the sub-

¹ 3 L. R. A. 797, citing 1 Mor. Priv. Corp., sec. 47 *et seq.*; *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112. See also *Yonkers Gazette Co. v. Taylor*, 51 N. Y. S. 969; *Wilson v. Hundley*, 30 S. E. Rep. 492; *Walter A. Wood's Harvester Co. v. Robbins*, 57 N. W. Rep. 317; *West v. Crawford*, 80 Cal. 19; *Belton Compress Co. v. Saunders*, 70 Tex. 699. And the contract is several. *Gibbons v. Grinsel*, 79 Wis. 365.

² *Cook's Stock & Stockh.*, sec. 138; *Acetylene Light, etc. Co. v. Beck*, 6 Pa. Sup. Ct. 584.

³ *Minneapolis Threshing Machine Co. v. Davis*, 3 L. R. A. 797; *Cook's Stock & Stockh.*, sec. 138, and cases cited; *Yonkers Gazette Co. v. Jones*, 51 N. Y. S. 973; *Wilson v. Hundley*, 30 S. E. Rep. 492; *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124; *Philadelphia & D. C. R. Co. v. Conway*, 177 Pa. St. 364.

⁴ *Minneapolis Threshing Machine Co. v. Davis*, 3 L. R. A. 797, 800; *Cook's Stock & Stockh.*, sec. 82. See also *Brown v. Drake*, 101 Ga. 180; *Penobscot & Kennebec R. R. Co. v. Dunn*, 39 Me. 587.

⁵ *Great Western Tel. Co. v. Gray* (Ill.), 11 West. Rep. 739. See also *Upton v. Tribilecock*, 91 U. S. 45.

⁶ (Ind.) 9 West. Rep. 33.

⁷ *Coffin v. Ransdell* (Ind.), 9 West. Rep. 33; *Holman v. State*, 105 Ind. 569; *Graff v. Pittsburg, etc. Co.*, 31 Pa. St. 489; *Osgood v. King*, 42 Iowa, 478; *Boynton v. Hatch*, 47 N. Y. 225; *Burke v. Smith*, 83 U. S. 390; *Crawford v. Rohrer*, 59 Md. 599; *Christholm v. Forney*, 65 Iowa, 333.

⁸ *Litchfield Bank v. Church*, 29 Conn. 137; *Great Western Tel. Co. v. Haight*, 49 Ill. App. 633. And see also cases cited in notes to *Yale Gas Stove Co. v. Wilcox*, 25 L. R. A. 101.

⁹ *York Park Bldg. Assn. v. Barnes* (Neb.), 58 N. W. Rep. 440.

scribers be a defense to an action brought against another subscriber who was not a party to such agreement, since the first agreement being void it cannot serve as a defense in an action upon another.¹⁰

Subscriptions to the capital stock of a corporation may be paid in property, letters-patent, labor or services, providing the payment is made in this way in good faith and in property reasonably worth the amount of the stock allowed for it.¹¹ In the absence of any fraudulent intent on the part of the subscriber who exchanges property for stock, an overvaluation will not avoid the transaction.¹² But where it is clearly established that there has been such an overvaluation of the property taken in exchange for stock as to amount to a fraud upon the creditors and other stockholders, the stockholder thus getting the benefit of the fraud will be compelled to pay for his stock at its par value.¹³ In the case of *Herbert v. Uhl*¹⁴ a promoter was allowed one-fifth of the capital stock for his services in effecting the organization of the corporation, and it was held that whether or not such services were reasonably worth the amount of stock allowed for them was a question to be determined by a jury. So, too, where the partnership assets were turned over to a corporation, and a resolution of the directors was passed to the effect that when the stockholders paid their proportionate share of a call for \$4,000 it would be in full payment

of the entire capital stock, which was to be \$150,000 it was held that this resolution was not conclusive against creditors, and that the stockholders were still liable for the amount of the capital stock not actually paid for by them.¹⁵ But whether the capital stock is paid for in money or property, it must be paid for in money's worth to be valid against the claims of creditors, as otherwise the taker of such shares of stock will be liable in a proceeding in favor of creditors to make good the difference between their par value and what he actually gives for them.¹⁶ Thus, in the case of *Rickerson Roller Mill Co. v. Farrell Foundry Co.*,¹⁷ it was held that a corporation could sell its shares of stock at less than its par value for the purpose of providing new capital to carry on its business, but that the purchasers would take it subject to the contingency that in case of insolvency they would be liable to creditors, who became such in ignorance of the arrangement by which the stock was sold for less than its par value, for the difference between its selling and par value, and that in the absence of statutory and charter provisions a corporation may sell its stock for less than its par value, and creditors who knew of it could not insist on full payment.

Since the decision of Justice Story in the case of *Wood v. Dummer*,¹⁸ there is a long line of authorities which hold that the capital stock and the other property of a corporation constitute a trust fund for the payment of creditors.¹⁹ Whenever any attempt was to be made to make the stockholders respond for the debts of an insolvent corporation this so-called "trust fund" doctrine was invoked, and the case was considered closed against them. However, some comparatively recent cases have called this doctrine in question, and it cannot be said to be by any means a settled question. In one case it was said that the trust fund doctrine had been doing duty for many years in a manner that its originator

¹⁰ *Armstrong v. Danahy*, 75 Hun, 405. See also *Wilson v. Hundley*, 30 S. E. Rep. 492.

¹¹ *Coffin v. Ransdell* (Ind.), 9 West. Rep. 33. See also the cases cited by the court at page 36. *Lyons v. Ewings*, 17 Wis. 63; *Clark v. Farrington*, 11 Wis. 321; *Woolfolk v. January*, 131 Mo. 620; *Shannon v. Stevenson*, 173 Pa. St. 419; *Grant v. East & West R. Co.*, 54 Fed. Rep. 569; *Herbert v. Uhl*, 66 Hun, 626; *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879; *Medler v. Albuquerque Hotel & Opera House Co.*, 28 Pac. Rep. 551; *Graves v. Brooke*, 5 Detroit Leg. N. 303.

¹² *Young v. Erie Iron Co.*, 65 Mich. 111; *Streator Reclining Car Seat Co. v. Rankin*, 45 Ill. App. 226; *Clayton v. Ore Knob Copper Co.*, 14 S. E. Rep. 36; *Penfield v. Dawson Town & Gas Co.*, 77 N. W. Rep. 672; *Nat. Bank v. Ill. & Wis. Lumber Co.*, 77 N. W. Rep. 185. See also cases cited in note to *Huntington v. Atrill*, 38 Am. & Eng. Corp. Cas. 413, 414; *Coit v. N. C. Gold, etc. Co.*, 119 U. S. 343. But see *Cole v. Adams*, 49 S. W. Rep. 1052.

¹³ *Lloyd v. Preston*, 146 U. S. 630; *Preston v. Cincinnati & E. R. Co.*, 36 Fed. Rep. 54; *Boulton Carbon Co. v. Mills*, 5 L. R. A. 649; *Bailey v. Pittsburg Gas, etc. Co.*, 69 Pa. St. 334; *Boynton v. Hatch*, 47 N. Y. 225; *Wishard v. Hansen*, 68 N. W. Rep. 691; *Nat. Bank v. Ill. & Wis. Lumber Co.*, 77 N. W. Rep. 185.

¹⁴ 66 Hun, 626.

¹⁵ *Camden v. Stewart*, 144 U. S. 104.

¹⁶ *Leucke v. Treadway*, 45 Mo. App. 507; *Thayer v. El Plomo Min. Co.*, 49 Ill. App. 341; *Neuney v. Waddill*, 25 S. W. Rep. 308; *Henderson v. Turngren*, 35 Pac. Rep. 495.

¹⁷ 75 Fed. Rep. 554.

¹⁸ 3 Mason, 308.

¹⁹ *Sawyer v. Hoag*, 84 U. S. 610; *South Bend Toy Mfg. Co. v. Pierre Fire & Marine Ins. Co.*, 56 N. W. Rep. 98. And see also the cases cited in 23 Amer. & Eng. Enc. Law, 857, note.

never intended, and that it was constantly being misapplied. In *Hospes v. Northwestern Manufacturing & Car Co.*,²⁰ the court says: "This 'trust fund' doctrine has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules." Applying these principles to this case the court held, first, that the capital stock of a corporation was no more impressed with a trust than its other assets; second, that a corporation may hold and use all its capital stock the same as a natural person; and, third, that the question of the liability of holders of "bonus" stock to creditors depended entirely upon the question of fraud. Hence, it was held that when the debt was contracted before the issue of the "bonus" stock the creditor could not complain, and could not collect his debt from the holders of this stock.²¹ Neither could an assignee of the creditors of an insolvent corporation, who had purchased their claims for a nominal sum, speculate on the liability of stockholders, without showing exactly what he had paid for them. It was also held, in *O'Bear Jewelry Co. v. Volfer*,²² that the property of an insolvent corporation was not a trust fund for the benefit of creditors in any other sense than that when a chancery court takes possession of it upon some general principle of equity jurisdiction, wholly independent of any idea that the property constitutes a trust fund, it will be administered for the equal benefit of the creditors. This is a well considered case and overruled a long line of decisions of the Alabama supreme court on the "trust fund" doctrine. And also in *Bank v. Salt & Lumber Co.*²³ the Supreme Court of Michigan repudiates the

"trust fund" doctrine in the following words: "The rule in this State has been established since the case of *Town v. Bank*, 2 Doug. 530, that a corporation may, in the absence of legislative restrictions, deal with its property precisely as an individual may, and may prefer one creditor over another; and hence its assets do not become a trust fund, for *pro rata* distribution among all its creditors until steps are taken under the "Winding up Act." So, too, Judge Brewer, in *Hollins v. Brierfield Coal & Iron Co.*,²⁴ uses the following language: "Neither the insolvency of the corporation nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon." These later cases seem to reduce the "trust fund" doctrine to the principle, that a corporation like a natural person can make no unlawful disposition of its property to the prejudice of creditors who became such by relying upon that property; that stock subscriptions like any other debt due the corporation are assets to be used in paying creditors, and that whether the property of a corporation be cash, credits, real estate, unpaid subscriptions, merchandise or personal property, it is all to be treated alike, and that one kind of corporate property is no more a trust fund than another kind. In *Wabash, St. L. & P. R. Co. v. Ham*,²⁵ the court construed the "trust fund" doctrine as follows: "The property of a corporation is doubtless a trust fund for the payment of its debts in the sense, that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among stockholders. It is also true, in the case of a corporation as in the case of a natural person, that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors is void."

Some courts hold that inasmuch as the stock and assets of a corporation constitute a trust fund for the benefit of creditors, it may be followed by those creditors into the hands of any one having knowledge of the

²⁰ 50 N. W. Rep. 1117; 48 Minn. 174.

²¹ But see *Railroad Co. v. Smith*, 48 Ohio St. 219.

²² 28 L. R. A. 707. See also *Corey v. Wadsworth*, 25 South. Rep. 503.

²³ 90 Mich. 345. See also 2 Pom. Eq. Jur., secs. 1044, 1045; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371; *Graham v. La Cross & M. R. Co.*, 102 U. S. 148; *Childs v. N. P. Carlstein Co.*, 76 Fed. Rep. 86. *Worthen v. Griffith*, 59 Ark. 562.

²⁴ 150 U. S. 371.

²⁵ 114 U. S. 587.

trust, and that any person who holds stock which he knows was not fully paid for when he acquired it, will be liable to make up the difference between its par value and the amount actually paid therefor.²⁶ However, a stockholder who in good faith becomes such under the belief that his stock is fully paid, will not be liable to creditors for any difference between what the corporation received therefor and its par value.²⁷ Nor will one who holds stock as a pledge or a collateral security be liable to creditors for unpaid subscriptions.²⁸ However, it has been held that a person to whom stock has been issued and who appears by the books of the corporation to be the owner, is liable to creditors for the unpaid balance of subscription, though he may not be the owner of the stock.²⁹ There seems to be a conflict of authority upon the question of the availability of the defense that the subscriber was induced by fraud or misrepresentations of the promoters to become a stockholder. Some courts hold that when the subscriber is sued for his subscription he cannot set up such a defense to his suit. In the case of *St. John's Manfg. Co. v. Munger*,³⁰ it was sought to hold the defendant upon his contract of subscription, and the defendant endeavored to defend on the ground that he had been deceived by the promoters of the corporation and was induced by fraud to become a subscriber. The court, in affirming a judgment against the defendant, says: "The proposition that such stockholder could charge the association with fraud of interested persons is suggestive of troublesome results. If this can be done, and the stockholder thereby escape payment for his stock, other stockholders, innocent of the fraud, would find their responsibilities proportionately increased, and the burdens of the concern would be shifted upon those members who were unable to show that they became such through the fraud of others. There would be little safety to stock-

holders if this doctrine should be sustained."

In this case it was held that a subscriber who had been induced by fraud to join a corporation might refuse to do so on discovering fraud, but that by carrying out his agreement and uniting with others he had assumed new relations with them and the public after which his remedy is restricted to action against the wrongdoers.³¹ In *Mathis v. Pridham*,³² which was an action by a receiver in behalf of creditors for an unpaid subscription, it was held that a plea by the defendant to the effect that the corporation had induced him to become a subscriber through fraudulent representations would not avail.

But in *Savidge v. Bartlett*,³³ it was held that where a subscriber to the capital stock of a corporation was induced to become such by the fraud of the corporation, and the contract was repudiated as soon as the fraud was discovered and before the corporation became insolvent, in an action by the assignee to collect the subscription the defendant could take advantage of the fraud, although the creditors had given credit on the strength of the subscription. And in *Wells v. Jones*,³⁴ a defendant was allowed to defend an action upon a note given for stock which he subscribed for under misrepresentations of an officer of the corporation, where the holder of the note was not a *bona fide* holder thereof. So, too, in *Beal v. Dillon*,³⁵ it was held that an assignee at law of an insolvent corporation might maintain an action against a delinquent stockholder therein to collect an unpaid subscription to the capital stock of such corporation, and in such action the stockholder may interpose the defense that he was fraudulently induced to become a subscriber to the capital stock through the false and fraudulent representations of the corporation and its officers. A careful examination of the authorities will show that the best considered cases hold that fraud will vitiate the contract of subscription when seasonably discovered and repudiated, and before the rights of third persons have intervened;³⁶ that any action of

²⁶ *Boulton Carbon Co. v. Mills*, 5 L. R. A. 649; *Bartlett v. Drew*, 57 N. Y. 587; *Nat. Trust Co. v. Miller*, 38 N. J. Eq. 155.

²⁷ *Morgan v. Howland*, 89 Me. 484; *Mallinckrodt Chemical Works v. Belleville Glass Co.*, 34 Ill. App. 404.

²⁸ *Becher v. Wells Flouring Mill Co.*, 1 McCrary (U. S.), 62.

²⁹ *Baines v. Babcock*, 27 Pac. Rep. 674, 30 Pac. Rep. 776; *Baines v. Story*, 27 Pac. Rep. 676.

³⁰ 106 Mich. 90. See also *Oldham v. Mt. Sterling Imp. Co.*, 45 S. W. Rep. 779; *Seymour v. Jefferson*, 74 N. W. Rep. 149; *McDowell v. Sheehan*, 59 Hun, 618.

³¹ The court cited 4 Amer. & Eng. Ency. Law, 201, and notes; *Carmody v. Powers*, 60 Mich. 26. See also *Duffield v. Barnum & Iron Works*, 64 Mich. 293.

³² 20 S. W. Rep. 1015.

³³ 28 Atl. Rep. 414. See also *Virginia Land Co. v. Haupt*, 19 S. E. Rep. 168.

³⁴ *Wells v. Jones*, 41 Mo. App. 1.

³⁵ 47 Pac. Rep. 317.

³⁶ *McDermott v. Harrison*, 9 N. Y. S. 184; *Duffield*

the subscriber which indicates his purpose to waive the fraud will be fatal to his defense on that ground;³⁷ and that as between the corporation and the subscriber the fraudulent representations of its officers and agents will, in an action by the corporation for the amount of the subscription, be a good defense.³⁸

Since according to the common law a subscriber is not liable on his subscription until the whole amount of the capital stock has been subscribed for,³⁹ it follows that one who has subscribed for the capital stock of a corporation after its charter has been granted, cannot be compelled to pay his subscription until the whole amount has been subscribed, unless the charter or the subscription or the acts of the legislature contain a special provision to the contrary.⁴⁰ But this right to insist on the full subscription may be waived by the acts of the subscriber.⁴¹ After a corporation has been placed in the hands of a receiver, in an action by the receiver for unpaid subscriptions, the defendants cannot be allowed to set off claims that they hold against the corporation, but will be compelled to pay their subscription and then take their *pro rata* share with the creditors.⁴² Thus, in *Sawyer v. Hoag*,⁴³ the court uses the following language: "The debt which the appellant owed for his stock was a trust fund devoted to the

payment of all the creditors of the company. As soon as the company became insolvent and this fact became known to the appellant, the right of set off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." In an action by the receiver against subscribers to the capital stock of a corporation for the unpaid subscriptions, for the benefit of creditors, the judgment against the corporation is conclusive against the stockholders,⁴⁴ but the receiver will not be allowed to collect from the stockholders more than enough to pay the debts and the costs of collecting them.⁴⁵ A suit in equity is the proper proceeding for the receiver to institute in order to collect unpaid subscriptions for the benefit of creditors.⁴⁶

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⁴⁴ *Powell v. Oregonian R. R. Co.*, 38 Fed. Rep. 187; *Cole v. Adams*, 49 S. W. Rep. 1052.

⁴⁵ *Cumberland Lumber Co. v. Clinton Hill Lumber Co.*, 42 Atl. Rep. 585; *Scoville v. Thayer*, 105 U. S. 143; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Johnston v. Allis*, 41 Atl. Rep. 816.

⁴⁶ *Wellington v. Cent. Constr., etc. Co.*, 52 Hun. 408; *Johnston v. Markle Paper Co.*, 153 Pa. St. 189; *Potter v. Dean*, 95 Cal. 578. It was held in *Stoddard v. Lum*, 53 N. E. Rep. 1108, that a subscription to the stock of a corporation creates a debt enforceable, at law or in equity, by the corporation or its legal representative.

v. Barnum Wire & Iron Works, 64 Mich. 293; *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188; *Thomp. Lia. Stockh.*, sec. 142. *Urner v. Sallenberger*, 43 Atl. Rep. 810.

³⁷ *Lear v. Paige Lumber Mfg. Co.*, 42 S. W. Rep. 808.

³⁸ *Ramsey v. Thompson Mfg. Co.*, 22 S. W. Rep. 719; *Talmadge v. Sanitary Security Co.*, 52 N. Y. S. 139; *McClanahan v. Ivanhoe Land Improvement Co.*, 30 S. E. Rep. 450; *Wilson v. Hundley*, 30 S. E. Rep. 492; *Franey v. Wamwatoso Park Co.*, 74 N. W. Rep. 548; *In re Dunlop, etc. Co.*, 66 Law J. Ch. 25; *Denney Hotel Co. v. Schram*, 32 Pac. Rep. 1002.

³⁹ *Crynski v. Loustaunau*, 15 S. W. Rep. 674. See also *Arkadelphia Cotton Mills v. Trimble*, 15 S. W. Rep. 776; *International Fair Assn. v. Walker*, 88 Mich. 62; *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.), 277; *Somerset R. Co. v. Clark*, 61 Me. 384; *Peoria & R. I. R. Co. v. Preston*, 35 Iowa, 118; *Topeka Bridge Co. v. Cummings*, 3 Kan. 69; *New York, H. & N. R. Co. v. Hunt*, 39 Conn. 75; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390; *Shurtz v. Railroad Co.*, 9 Mich. 269; *Carlisle v. Saginaw Valley & St. L. R. Co.*, 27 Mich. 314.

⁴⁰ *International Fair Assn. v. Walker*, 88 Mich. 62.

⁴¹ *Thompson v. Reno Sav. Bank*, 19 Nev. 103; *Tama Water Purer Co. v. Hopkins*, 44 N. W. Rep. 797; *Mathis v. Pridham*, 20 S. W. Rep. 1015; *Bausman v. Kinner*, 79 Fed. Rep. 172; *Scoville v. Thayer*, 105 U. S. 152; *Shickle v. Watts*, 94 Mo. 410; *Singer v. Given*, 61 Iowa, 93.

⁴² 17 Wall. (U. S.) 622.

ALIENATING HUSBAND'S AFFECTIONS — INSTRUCTIONS — EVIDENCE — OFFER TO PROVE.

EAGON V. EAGON.

Supreme Court of Kansas, July 8, 1899.

1. In an action by a wife against her father-in-law for alienating the affections of her husband, the plaintiff offered testimony of the declarations of the defendant to his son, during the time she alleged that he was accomplishing the alienation, to the effect that he did not desire his son to live with plaintiff, and that he would not give him any money if he continued to do so, etc. Defendant denied these statements, and by his own and other testimony sought to show that, during the period mentioned, he had told his son, at different times, to bring his wife to defendant's home, and that he ought to live with her. Held, that such declarations were inadmissible, as self serving, and not part of the *res gestæ*.

2. In order to enable a trial court to determine whether facts sought to be proven by a witness are admissible in evidence, it is proper to make an offer to prove the facts which the party assumes his question will elicit.

3. The court instructed the jury, on behalf of the plaintiff, as follows: "A parent is not liable in damages to his son's wife for advising the son to separate from his wife, if such advice is prompted by the proper parental motives for his son's welfare and happiness, instead of malice; but you are further instructed that such advice will be malicious towards the son's wife, and no protection to the parent, unless the wife were guilty of acts which could be charged as grounds for divorce against her." Held error, in that, in all such cases, the question of malice is for the jury to determine, and that the liability of the defendant cannot be made to depend upon the non-existence of grounds for divorce in favor of the husband against the wife.

SMITH, J.: In her petition in the court below Flora E. Eagon alleged that on December 17, 1894, she was married to James S. Eagon, and that she lived happily with him, without discord or disagreement, until October 10, 1895, when the defendant, John M. Eagon (the father of her husband), by means of misrepresentations, statements and inducements then and previously made to his son, purposely, willfully and maliciously did procure his said son to separate himself from plaintiff, to neglect his marital duties, and wholly cease to live with her, thus alienating the affections of her husband from her, and causing a permanent separation. A trial was had, with a verdict and judgment for the plaintiff below.

Plaintiff produced at the trial witnesses to conversations had by the defendant, John M. Eagon, with his son (her husband), wherein the defendant below had made promises to and threats towards his son, thus inducing him to separate from the plaintiff. The nature of this testimony is shown by an extract from the deposition of one Goforth: "Well, Jim asked his pa for some money. Mr. Eagon said, 'What do you want with it, Jim?' 'Why,' he says, 'I want to go to housekeeping.' Mr. Eagon says, 'You shan't have a cent of my money as long as you live with that woman.'" The defendant below offered to show, by his own testimony and that of another witness, that, in conversations with his son during the time when he was charged with making such inducements, he used language towards him of directly opposite import from that testified to by the plaintiff's witnesses; that he told the son to bring his wife to his house; and, on another occasion, that he ought to live with her, etc. Such proof was excluded by the court, on the ground that defendant's statements to his son were self-serving declarations, made in his own interest, were hearsay, and no part of the *res gestæ*. It is not contended that such conversations with his son, favorable to himself, which the defendant below sought to bring before the jury, were parts of conversations testified to by the witnesses for the plaintiff below, or tending to explain what he said to her witnesses, but were statements made by him to his son at other times, possibly days or weeks prior or subsequent to the declarations of defendant heard by the witnesses of plaintiff below. The testimony offered did not tend to ex-

plain or illustrate the main fact. The *res gestæ* fact in the case was, what did defendant below say against the marital interests of daughter-in-law? Contradictory words would fall outside of the *res gestæ*, and hence were incompetent as evidence. The main fact being the hostile attitude of the defendant below, his declarations showing expressions of friendship were not calculated to explain or characterize such acts and conduct as was shown by the evidence introduced by plaintiff. Greenleaf, in his work on Evidence, in defining "*res gestæ*," says: "The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected as to illustrate its character." Volume 1, § 108. *Res gestæ* is matter incidental to a main fact, and explanatory of it. It is made up of acts and words which are so closely connected with a main fact as to really constitute a part of it, and without a knowledge of which the main fact might not be properly understood. Where the *res gestæ* is a declaration of a particular kind, another declaration, made at another time, in no way related to it, and of directly opposing character, is not explanatory. It is contradictory. The main fact under consideration here being whether the defendant below had, by hostile acts or words, alienated the affections of his son from his son's wife, statements made at other times than those testified to by the plaintiff's witnesses would not be contemporaneous with the main fact, and for that reason were objectionable. Nor is such testimony admissible for the purpose of showing the state of mind of the defendant below towards the plaintiff in the action. The defendant's state of mind was not the question to be litigated, and the court below would embark upon an unprofitable voyage of psychological discovery, resulting in no return of practical value, in permitting the defendant to show, by relating conversations with his son, the state of his mind as affecting his conduct in the case stated.

A question of practice is involved in the refusal of the trial court to permit counsel for the defendant below to make the offer of proof above mentioned. He was required to ask the witness questions calling forth the testimony he desired to get before the jury. This requirement has left the record of the testimony sought to be elicited in an unsatisfactory condition. It is difficult, in most cases, to present to the court explicitly, in the form of questions, the exact proof offered. Where the questions do not clearly show the nature of the testimony, an offer of proof ought to be received. In fact, the precise question involved can thus be more clearly presented to the trial court, and preserved in the record for review. We approve the practice of making the tender. *State v. Barker*, 43 Kan. 262, 23 Pac. Rep. 575. In *Elliott*, App. Proc. § 743, it is said: "In the examination in chief, the exclusion of testimony is not available as error, unless the

party makes an offer to prove the facts which he assumes that his question will elicit. Where an objection is properly interposed, more must be done, in cases where the objection is sustained, than to ask the question. The party producing the witness, and insisting upon the question, must state what he proposes to prove by the witness. This is necessary, in order to enable the court to determine whether the testimony is competent and material. The record must show the offer, and show, also, the presence of the witness. The court will not rule upon mere abstract questions, and hence it must appear that there was an actual offer, and a present ability to adduce the proffered testimony. The facts proposed to be proved must be specifically stated. * * * In short, there should be satisfactory indications of willingness, readiness, good faith and present ability." We think the court should have permitted counsel for the defendant below to make an offer to prove those facts which were so imperfectly developed by the several questions asked of the witnesses.

The plaintiff below was permitted to testify concerning the actions and manner of her husband at a time when he and his father were in a freight car at Overbrook. This was to the effect that the former came to the car door, and took a position indicating that he was about to step out, and that he looked at his father, turned around, and went back into the car. It is claimed that this was incompetent, as constituting a communication between husband and wife. We do not think so. The communication, if any was shown, was between father and son. It is contended that the wife is not disqualified from giving testimony of communications had with her by her husband in the presence and hearing of third persons; that it is the privacy of the confidential relation between husband and wife that the law seeks to protect. This contention is unsound. The statute disqualifies both husband and wife. The disqualification goes to the witness, not to the subject-matter of the testimony. However public the communication may be, and however numerous the hearers, husband and wife cannot be heard in court concerning it. *State v. Buffington*, 20 Kan. 599, 615.

Complaint is made that the trial court permitted the plaintiff below to testify that she entertained a strong affection for her husband. This was no more than the fortifying of a presumption. The proof was unnecessary, but its admission was not error. In *Bailey v. Bailey*, 94 Iowa, 598, 63 N. W. Rep. 341, it is said: "The state of her mind, and the ardor of her love, are not material, except upon the question of damages. The law indulges a presumption, no doubt, that the husband had affection for his wife; and it rests with the defense to prove that he did not have."

The sixth instruction to the jury by the court was erroneous. It reads: "I instruct you, gentlemen of the jury, that a parent is not liable in damages to his son's wife for advising the son to

separate from his wife, if such advice is prompted by the proper parental motives for his son's welfare and happiness, instead of malice; but you are further instructed that such advice will be malicious towards the son's wife, and no protection to the parent, unless the wife were guilty of acts which could be charged as grounds of divorce against her." This direction took from the consideration of the jury the question of malice, unless the wife was guilty of acts which could be charged as grounds of divorce against her. This rule is too harsh. Suppose a case where a father, by his advice and counsel, induced his married daughter to leave a worthless husband, and return to the parental roof. It might be that the husband had willfully deserted his wife for 11 months, and yet, under the law laid down by the trial court, the action of the father would be malicious, and recovery of damages could be had against him by the husband; for, to constitute a ground of divorce, the abandonment must have continued for one year. Again, "the conviction of a felony and imprisonment in the penitentiary therefor subsequent to the marriage" is ground for a divorce. Under the law of said instruction, inducements held out by the father, causing his daughter to desert a husband convicted of a felony, but before imprisonment in the penitentiary therefor, would be malicious and actionable. The husband might be guilty of such neglect of his marital duties as not to amount in law to gross neglect (which is one of the grounds for divorce), and yet there might be many cases of such dereliction which would justify a parent in advising his daughter to submit no longer to indignities falling short of furnishing grounds for divorce. In actions of this kind, the question must be whether the father was moved by malice, or by proper parental motives for the welfare and happiness of his child. He may have erred in his advice as to the best course to be taken in dealing with so difficult a question, but he is entitled in every case to have a jury pass upon the integrity of his intentions, and determine the existence of bad motives. In *Tucker v. Tucker* (Miss.), 19 South. Rep. 955, it is said: "In every suit of this character, the principal inquiry is: From what motive did the father act? Was it malicious, or was it inspired by a proper parental regard for the welfare and happiness of his child? The instinct and conscience unite to impose upon every parent the duty of watching over, caring for, and counseling and advising the child at every period of life, upon marriage and after marriage, whenever the necessities of the child's situation require or justify such action on the parent's part. The reciprocal obligations of parent and child last through life, and the duty of discharging these divinely implanted obligations is not, and cannot be, destroyed by the child's marriage. Multiplied instances will occur to the mind in which a failure of a father to speak and to act would be regarded with horror. A daughter who has

recklessly contracted an undesirable marriage with a man utterly unworthy to be the husband of a virtuous woman, against the wish and over the vigorous protest of the father, and who has, by such ill-starred union, been brought to wretchedness and humiliation, and want of the ordinary comforts of life, may surely be advised, counseled and cared for in the parental home, even against the will and expressed wish of the unfaithful husband."

By the instruction given, there being no grounds of divorce shown to exist in favor of the husband against the wife, the jury were told that the action of the father in advising the son to leave her was malicious, and no discretion as to the existence of malice was left to the jury after it had found that the defendant below had used language toward his son tending to induce him to leave the defendant in error. Malice cannot be inferred from the fact that no ground for divorce existed. The father stands in a very different relation toward his married son or daughter than a stranger would occupy toward the same persons. Natural affection would imply that the advice and counsel extended to them were prompted by good motives, and unworthy objects cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. *Gerner v. Gerner*, 185 Pa. St. 233, 39 Atl. Rep. 884. In *Reed v. Reed*, 6 Ind. App. 317, 33 Atl. Rep. 638, it is said: "When trouble and disagreements arise between the married pair, the most natural promptings of the child direct it to find solace and advice under the parental roof. All legitimate presumptions in such case must be that the parent will act only for the best interests of the child. The law recognizes the right of the parent in such cases to advise the son or daughter; and when such advice is given in good faith, and results in a separation, the act does not give the injured party a right of action. In such a case the motives of the parent are presumed good until the contrary is made to appear. These rules have generally been applied in cases where the suit was brought by the husband for the alienation of his wife; and we see no reason why they should not, with proper modification, prevail where the wife is the plaintiff." The instruction above set out was clearly erroneous, and for that reason the judgment of the court below is reversed, and a new trial ordered.

NOTE.—Recent Decisions on Actions for Alienation of Affections of Spouse.—A wife may maintain an action against her mother-in-law, who wrongfully enticed her husband to abandon her. *Williams v. Williams* (Colo. Sup.), 37 Pac. Rep. 614. Where a married woman may "sue and be sued in the same manner as if she were unmarried" (Comp. St. ch. 53, sec. 3), a wife can sue, for damages, a person inducing her husband to desert her. *Hodgkinson v. Hodgkinson* (Neb.), 43 Neb. 269, 61 N. W. Rep. 577. To maintain an action for alienating the affections of a husband and enticing him away, it is not enough that there was an attempt to alienate and entice, but the attempt must have been successful. *Van Olinda v. Hall* (Sup.),

34 N. Y. S. 377. In an action by a wife for the alienation of her husband's affections, evidence that plaintiff was accustomed to use vulgar language, and taught her child to do so also, is admissible to show the state of domestic happiness in which plaintiff and her husband lived, and also to show her character. *Bailey v. Bailey* (Iowa), 63 N. W. Rep. 341. In an action against plaintiff's father-in-law for the alienation of her husband's affections, where it appears, that plaintiff is a Catholic and defendant a Protestant, evidence that defendant stated in plaintiff's presence that he would rather see his son dead than living with a Catholic is competent. *Rice v. Rice* (Mich.), 62 N. W. Rep. 833. In an action against plaintiff's father-in-law for the alienation of her husband's affections, defendant's wife cannot state what her objections to the marriage were. *Rice v. Rice* (Mich.), 62 N. W. Rep. 833. A father is not liable in damages to his son's wife because he objected to his son's marriage to her because she belonged to a certain church, and afterwards advised him that it would be unwise for him to live with her if she again joined her church. *Rice v. Rice* (Mich.), 62 N. W. Rep. 833. Evidence as to the amount of property owned by the husband's father, connected with evidence of threats of disinheritance, was admissible to show the weight of the inducement held out to the husband to abandon plaintiff. *Price v. Price* (Iowa), 60 N. W. Rep. 202. In an action by a wife against her husband's parents for alienating the affections of her husband, evidence of conversations between the husband and his father, and between his father and mother, while plaintiff and her husband were living with defendants, was admissible to explain the relations of the parties, and their motives for their actions. *Price v. Price* (Iowa), 60 N. W. Rep. 202. Under Rev. St. secs. 1996, 6869, authorizing a wife to sue alone in her own name, "with the same force and effect" as though unmarried, and entitling her, in her own right to damages growing out of "the violation of her personal rights," a wife may maintain an action for damages against a third person for alienating the affections of her husband. *Nichols v. Nichols* (Mo. Sup.), 35 S. W. Rep. 577. Plaintiff, a married woman, has no cause of action against defendant merely because she (defendant) lives in meretricious relations with plaintiff's husband, assuming to bear his surname, and defendant's conduct is calculated to prejudice plaintiff's standing in the community; the action not being founded on any charge of libel or slander, or that defendant has alienated from plaintiff the affections of her husband, and there being no allegation that plaintiff still lives with him, or that her cohabitation with him was discontinued for any cause attributable to defendant. *Hodecker v. Stricker* (Sup.), 39 N. Y. S. 515. A father-in-law is not liable to his daughter-in-law for alienation of her husband's affections, if his actions and advice were prompted by a parental desire for the welfare and happiness of his son, and not by malice. *Tucker v. Tucker* (Miss.), 19 South. Rep. 955. In an action for alienation of a husband's affections, and inducing him to abandon her, conversations between plaintiff and defendant, subsequent to the desertion, are inadmissible, unless confessions, to show that the desertion was caused by the wrongful inducement of defendant. *Tucker v. Tucker* (Miss.), 19 South. Rep. 955. At common law a wife had a cause of action for the alienation of her husband's affections, but by reason of the disability of coverture it remained in abeyance, and could not be prosecuted in her own name. *Smith v. Smith* (Tenn. Sup.), 38 S. W. Rep. 439. A married woman can maintain an action against persons who

wrongfully entice her husband from her and alienate his affections, and thereby cause a separation between them. *Lockwood v. Lockwood* (Minn.), 70 N. W. Rep. 784. In an action by a husband for the alienation of his wife's affection, a letter from the wife to defendant, inviting him to call on her, is admissible to explain his subsequent visit to her. *Puth v. Zimbleman* (Iowa), 68 N. W. Rep. 895. In an action for alienation of a wife's affections, evidence that, since the commencement of the suit, plaintiff had instituted proceedings for a divorce, and obtained a decree, was competent to negative any claim of a reconciliation between himself and wife. *Mead v. Randall* (Mich.), 69 N. W. Rep. 506. In an action by a husband against his wife's parents for alienating the affections of his wife, where plaintiff introduced statements made by his wife, testimony by the wife, on behalf of the defendants, was admissible to show the state of her mind toward her husband. *McKenzie v. Lautenschlager* (Mich.), 71 N. W. Rep. 489. In an action by a wife against a woman for enticing away her husband, it is a question for the jury whether the meretricious favors accorded by defendant were not the inducing cause of the desertion of plaintiff, where her husband abandoned and remained away from her, and during the abandonment maintained improper relations with defendant. *Romaine v. Decker* (N. Y.), 43 N. Y. S. 79, 11 App. Div. 20. Pecuniary loss is not a prerequisite to the maintenance of an action for alienating a wife's affections. *Prettyman v. Williamson* (Del.), 39 Atl. Rep. 731. A husband cannot recover for the alienation of his wife's affections if the injury was the result of his own cruelty or misconduct unless it appear that defendant prevented a reconciliation. *Prettyman v. Williamson* (Del.), 39 Atl. Rep. 731. One who intentionally persuades another's wife to leave him is liable therefor, without reference to his motives in so doing. *Hartpence v. Rodgers* (Mo.), 45 S. W. Rep. 650. In an action for alienating a wife's affections, evidence is admissible to show the conduct of the wife toward defendant. *Childs v. Muckler* (Iowa), 75 N. W. Rep. 100. In an action for alienation of the affections of a wife, evidence is admissible that the husband was ready to take his wife to a place where she was taken by defendant, to show whether the wife went with defendant through choice or necessity. *Childs v. Muckler* (Iowa), 75 N. W. Rep. 100. Defendant was not entitled, in an action for alienating the affections of plaintiff's husband, to show plaintiff's ability to earn money, in order to have her earnings set off against her maintenance. *Bowersox v. Bowersox* (Mich.), 72 N. W. Rep. 986. It was proper to allow plaintiff, in an action for alienating the affections of her husband, to testify to the cost of living, where the evidence disclosed the condition in life of the husband and of his father's family, and there was some evidence as to his ability to support plaintiff. *Bowersox v. Bowersox* (Mich.), 72 N. W. Rep. 986. Facts showing that the relations between plaintiff and his wife were unhappy, that he failed to support her, and that he lived apart from her, may be shown in mitigation of damages in an action for alienating the wife's affections. *Prettyman v. Williamson* (Del.), 39 Atl. Rep. 731. The fact that the damages recovered in an action for enticing a husband away from his wife might be community property does not affect the wife's right of action. *Humphrey v. Pope* (Cal.), 54 Pac. Rep. 847. Under the married woman's act (Rev. St. 1889, sec. 6869), permitting a married woman to own property and rights in action, and to sue as a *feme sole*, she may sue for enticing her husband away from her, and

inducing him to abandon her. *Nichols v. Nichols* (Mo.), 48 S. W. Rep. 947. 1 Hill's Code, secs. 1408, 1409, providing that every married person shall hereafter have the same right to sue and be sued as if he or she were unmarried, and that all laws which impose civil disabilities upon the wife which are not imposed on the husband are abolished, and that she shall have the same right to sue in her own name for an unjust usurpation of her rights that the husband has, entitle a wife to bring an action for alienation of her husband's affections without his joining. *Beach v. Brown* (Wash.), 55 Pac. Rep. 46, 43 L. R. A. 114. A married woman cannot sue another woman for the alienation of the affections of plaintiff's husband. *Morgan v. Martin* (Me.), 42 Atl. Rep. 354. A parent is liable in damages for inducing his married child to abandon his wife, only where he did so maliciously. *Brown v. Brown* (N. Car.), 32 S. E. Rep. 320. Where a parent induces his married child to abandon his wife without proper investigation, or from recklessness, or through dishonest motives, malice is presumed. *Brown v. Brown* (N. Car.), 32 S. E. Rep. 320. It is no defense to an action by a wife for inducing her husband to abandon her, that at the time suit was brought the husband's affections had not been entirely alienated. *Nichols v. Nichols* (Mo.), 48 S. W. Rep. 947. A wife whose husband's affections have been wrongfully alienated does not lose her right to an action therefor by obtaining a divorce from him. *Beach v. Brown* (Wash.), 55 Pac. Rep. 46, 43 L. R. A. 114. In an action for inducing a husband to abandon his wife, newspaper notices, warning all persons against harboring or trusting the wife, signed by the husband, and inserted and paid for by defendant, are competent. *Nichols v. Nichols* (Mo.), 48 S. W. Rep. 947. In an action by a wife for inducing her husband to abandon her, proof of defendant's pecuniary condition is competent. *Nichols v. Nichols* (Mo.), 48 S. W. Rep. 947. A husband living and cohabiting with his wife, they having children, is presumed to have an affection for her, until such presumption is overthrown by preponderating evidence to the contrary. *Beach v. Brown* (Wash.), 55 Pac. Rep. 46, 43 L. R. A. 114. Testimony of what the husband said as to his object in writing the letters is inadmissible as being self-serving. *Beach v. Brown* (Wash.), 55 Pac. Rep. 46, 43 L. R. A. 114.

JETSAM AND FLOTSAM.

EVIDENCE—LETTERS—ANSWERS ADMITTED WITHOUT PREVIOUS LETTERS.

In *New Hampshire Trust Co. v. Korsemeyer Plumbing and Heating Co.*, 78 N. W. Rep. 303 (Nebraska, February 9, 1899), it was decided that a letter written in answer to another is admissible as evidence if fairly self-explanatory, although the letter which it answers is not offered along with it. The failure to produce the prior letter, it is said, may affect the weight of the letter, but not its admissibility. In the opinion, *Irvine, C. J.*, cites in approval the cases of *Barrymore v. Taylor*, 1 Esp. 326 (1795), and *De Medina v. Owen*, 3 Car. & K. 72 (1850), and states that *Greenleaf on Evidence* and *Underhill on Evidence* both give the rule otherwise, relying on *Phillips Watson v. Moore*, 1 Car. & K. 626 (1845).

Upon first consideration this question would necessarily seem to be of almost daily occurrence, yet the text books are nearly bare of citations. The case of

Walson v. Moore, above mentioned, or Watson v. Moore, as it appears in the English Common Law Reports, is of no great value. Plaintiff's counsel was stopped by Baron Pollack in the reading of a letter written by the defendant, the opening words having indicated that it was an answer to a letter of the plaintiff, and directed the other letter to be offered first, which was done. This case is given in Greenleaf in a note under section 201. The rule there laid down on its authority is followed by Lester v. Sutton, 7 Mich. 329 (1859), but so far as can be ascertained by no other cases.

In the first case cited by the court, Lord Barrymore v. Taylor, 1 Esp. 326 (1795), objection was made to the reading of certain letters unless the letters to which they were the answers were first produced, but Lord Kenyon said that there was no rule of law that required such evidence, that if opposing counsel thought them necessary to explain the transaction, he might produce them as they were in his client's possession. De Medina v. Owen, 3 Car. & K. 72, decided by Baron Parke some fifty years after, was also to the same effect. In Brayley v. Jones, 33 Iowa, 508 (1841), in answer to such an objection, the court said: "This may be the rule if the first letter is necessary to the understanding of the one offered, and will aid in the better understanding of it; or where it appears that the answer may be misunderstood without the letter to which it is a reply being read. But if the letter offered in evidence contains distinct and independent propositions or statements of facts which cannot be misunderstood if read alone, and are in no way dependent on the first letter, we are of opinion that it is admissible without the conditions suggested by counsel."

But is it not sufficient that it be intelligible when taken with the rest of the testimony. In Beech v. The Railroad, 37 N. Y. 457 (1868), it was held, with much reason, that the meaning of a letter might be ascertained from other evidence in the case, and the other authorities on the admissibility of letters do not make such a qualification.

Stone v. Sanborn, 104 Mass. 319 (1870), was an action for breach of promise of marriage. The plaintiff's counsel offered some of defendant's letters and some of plaintiff's, making selections of such as he desired to put in. The defendant objected, but the trial judge permitted them to be read. One of these letters appeared to be in reply and in reference to the contents of a letter of the plaintiff's, which was not put in. On appeal, this ruling was affirmed, Gray, J., saying: "If the letters which she introduced showed that they were written in reply to other letters, she might doubtless give in evidence those letters, too, as tending to explain the replies. She was not, however, bound to do so, but might leave it to defendant, upon cross-examination or otherwise, to offer any competent evidence of them or their contents if he wished. If the ruling of Chief Baron Pollock, in Watson v. Moore, 1 C. & K. 625, cited for the defendant, that the party offering the reply in evidence should put in both the letters or neither, was anything more than an exercise of discretion, as to the order of proof it is more than counter balanced by the opinion of Lord Kenyon in the earlier case of Barrymore v. Taylor, 1 Esp. 326, and of Baron Parke in the later one of De Medina v. Owen, 3 C. & K. 72. In Cray v. Pollard, 14 Allen, 284 (1867), the reply was held admissible as evidence of notice to the party to whom it was addressed, without producing the letter to which it referred; and the question whether it was admissible for any other purpose was not considered. When a particu-

lar communication which refers to a previous one is not introduced as containing the terms of a contract, we see no more reason for obliging the party offering it to put in the previous communication also, when the communications are written than when they are oral. In either case, whether the communications are by successive letters or by distinct conversations, the party introducing the second in evidence may introduce the first also, and if he does not the other party may. The actual custody of the paper does not affect the question which party shall introduce them but only the steps to compel their production."

Again, in North Berwick Co. v. Ins. Co., 52 Me. 336 (1863), it was said that the plaintiffs were under no obligations to offer more of the letters of defendants' agent than they should deem conducive to their interest. See, also, Newton v. Price, 41 Ga. 186 (1870); Taylor on Evidence, sec. 734; Wharton on Evidence, sec. 1103.

Where such a letter contains an admission, it must be clear that it should be excepted irrespective of the fact that it is in answer to another. Thus, in Woggin v. Railroad Co., 120 Mass. 201 (1876), plaintiffs declared in tort for the conversion of one hundred and fourteen bushels of oats taken by defendant's agent from a freight car to reduce the shipment to the amount at which the car had been billed. Plaintiffs offered in evidence a letter of the agent in reply of one of theirs admitting the removal of the oats, not giving quantity. The supreme court held that, as it contained the declaration of an agent within the scope of his authority, it was competent as offered.

In an action of trespass for some cases of rubber shoes, which plaintiff claimed had been consigned on commission, against a constable who had taken possession of them under an attachment against the consignees, certain letters of theirs admitting this fact were offered in evidence. They appeared to be in reply to others written by the plaintiff. Defendants objected to their admission, but the Supreme Court of Vermont held that they were properly received. Hayward Rubber Co. v. Duncklee, 30 Vt. 29 (1858).—*American Law Register*.

WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. **ABSOLUTE DEED NOT A MORTGAGE.**—Where, to keep property from sale under foreclosure, the mortgagors convey to the mortgagees by absolute deed, with the understanding that they shall have the privilege of repurchasing within a certain time, and after the lapse of such time the grantors in such deed lease the premises from the grantees, who take possession and make large improvements, with knowledge of the grantors, who assert no claim to the premises until five years after the transaction is closed, such deed will be held an absolute conveyance, and not an equitable mortgage.—*ABBOTT V. GRUNER*, Mich., 54 N. E. Rep. 1065.

2. **ACCIDENT INSURANCE**—Death from Accident—Limitation of Liability.—In a policy of accidental insurance providing for the payment of a weekly indemnity to the insured for loss of time resulting from bodily injuries sustained through external, violent, and accidental means, a further provision for the payment to a beneficiary named of a specified sum "if death shall result from such injuries alone, and within ninety days of the event causing said injuries," is unambiguous, and the limitation is valid, and there can be no recovery thereunder where death resulted more than 90 days after the injuries were received, though before the expiration of the term of the policy.—*BROWN V. UNITED STATES CASUALTY CO.*, U. S. C. C., N. D. (Cal.), 95 Fed. Rep. 935.

3. **ACCIDENT INSURANCE**—Release.—A beneficiary in an accident insurance policy, who, after he had apparently recovered from an injury, and after his physician had pronounced him recovered, signed and delivered a receipt for indemnity received, whereby he released and discharged the company in full from all claims which he had or might have on account of the personal injuries sustained, cannot, on suffering further consequences of the same injury, recover therefor.—*WOOD V. MASSACHUSETTS MUT. ACC. ASSN.*, Mass., 54 N. E. Rep. 541.

4. **ADMINISTRATORS**—Management of Estate.—The mere fact that an administrator pays off a lien on personal property of the estate, which, on a subsequent sale at public auction, fails to bring the amount of the lien, does not establish gross mismanagement of the estate, and the administrator is not chargeable with the loss, where he acted in good faith, and with reasonable care and prudence.—*IN RE ARMSTRONG'S ESTATE*, Cal., 55 Pac. Rep. 153.

5. **APPEAL AND ERROR**—Motion for New Trial—Exceptions.—Where it does not appear from the abstract that exceptions were taken to the overruling of a motion for a new trial based on the admission of irrelevant testimony, nor that the same were made a part of the record by bill of exceptions, the error complained of will not be reviewed.—*HOFFMAN V. ST. LOUIS TRUST CO.*, Mo., 52 S. W. Rep. 345.

6. **APPEAL IN EQUITY**—Review.—On appeal in equity, where all the evidence is open to review, the appellate court, while not concluded by the judgment below, will accord it proper deference, because, the testimony being oral, the court below can better weigh the same.—*SHANKLIN V. MCCracken*, Mo., 52 S. W. Rep. 339.

7. **BANKRUPTCY**—Acts of Bankruptcy.—Where a corporation, under the provisions of a State statute, files in a State court its voluntary application for dissolution and for the appointment of a receiver to wind up its affairs and distribute its assets, such application is not an assignment for the benefit of its creditors, nor equivalent thereto, and does not constitute an act of bankruptcy by the corporation.—*IN RE EMPIRE METALLIC BEDSTEAD CO.*, U. S. C. C., N. D. (N. Y.), 95 Fed. Rep. 957.

8. **BANKRUPTCY**—Exemptions—Method of Setting Apart.—Courts of bankruptcy, in setting apart to bankrupts the exemptions allowed them by the laws of the State, must proceed in accordance with such laws; and where the law of the State exempts from execution personal property of a certain value, to be selected by the debtor, it is not permissible to allow the bankrupt to select a trifling amount of personal property, and receive the entire difference in cash from the trustee.—*IN RE WOODARD*, U. S. D. C., E. D. (N. Car.), 95 Fed. Rep. 935.

9. **BANKRUPTCY**—Liens—Receivership.—Where a creditor brings a suit to avoid a fraudulent sale of chattels by his debtor, and procures the appointment of a receiver therein, the lien acquired thereby dates from the appointment of the receiver; but, if the action was begun more than four months before the filing of a voluntary petition in bankruptcy by the debtor, the lien will be recognized and protected in the bankruptcy proceedings according to section 67, cl. c, of the bankruptcy act, though the receiver was appointed within the four months, and did not qualify until after the institution of the proceedings in bankruptcy.—*IN RE O'CONNOR*, U. S. D. C., E. D. (N. Y.), 95 Fed. Rep. 948.

10. **BANKRUPTCY**—Opposition to Discharge—Insufficient Schedules.—Where the bankrupt, previous to the adjudication, had acted as administratrix of her husband's estate, and had mingled property of her own with the property of such estate, it is her duty, in the bankruptcy proceedings, to present a correct and intelligible statement of her affairs, showing clearly what property her husband left, what she added thereto, and the disposition made of each class of property, and thereupon to account for the property that should inure to the benefit of her creditors. Until she does this, her discharge will be withheld.—*IN RE WALTHER*, U. S. D. C., S. D. (N. Y.), 95 Fed. Rep. 941.

11. **BANKRUPTCY**—Opposition to Discharge—Keeping Books.—The destruction or concealment of books of account by a debtor, with intent to conceal his financial condition, is no ground for refusing to grant him a discharge in bankruptcy, unless committed since the enactment of the bankruptcy law.—*IN RE SHORER*, U. S. D. C., D. (Conn.), 95 Fed. Rep. 89.

12. **BANKRUPTCY**—Opposition to Discharge—Keeping Books.—Where, in 1891, an execution upon a judgment by confession was levied upon the debtor's stock, including the safe in which the books of account were kept, and the debtor, becoming bankrupt under the act of 1898, testified that he had never seen the books of account since that time, and did not know what had become of them, held, that the evidence was not sufficient to show that the loss or disappearance of the books in 1891 was brought about by any "fraudulent intent" on the part of the bankrupt to "conceal his true financial condition," and constituted no ground for refusing his discharge in bankruptcy.—*IN RE STARK*, U. S. D. C., S. D. (N. Y.), 95 Fed. Rep. 88.

13. **BANKRUPTCY**—Petitioning Creditors—Estoppel.—Where a debtor makes a general assignment for the benefit of his creditors, and judicial proceedings are instituted to enforce and carry out the assignment, creditors who, on being made parties to such proceedings, do not repudiate the assignment, nor begin proceedings in bankruptcy, but file their claims under the assignment, and participate in the administration of the estate, and suffer the assignee to sell the property and collect the proceeds, involving a delay of several months, and the incurring of costs and expenses, are estopped thereafter to file a petition in involuntary bankruptcy against the assignor, based solely on the ground of the assignment.—*SIMONSON V. SINSHEIMER*, U. S. C. C. of App., Sixth Circuit, 95 Fed. Rep. 948.

14. **BANKRUPTCY**—Powers of Referees—Citation to Bankrupt.—The referee to whom a case in bankruptcy has been referred has jurisdiction and power, on the petition of the trustee, to cite the bankrupt to appear before him, and show cause why he should not be or-

dered to surrender to the trustee property in his possession, claimed by the trustee as assets of the estate.—*IN RE OLIVER*, U. S. D. C., N. D. (Cal.), 96 Fed. Rep. 85.

15. **BANKRUPTCY**—Secured Creditors—Judgment Liens.—Where a creditor of a bankrupt claims priority of payment out of his estate by virtue of an alleged judgment lien on the property of the estate, the burden is on such claimant to show that he has done everything required by statute to make his judgment attach as a lien.—*IN RE WOOD*, U. S. D. C., E. D. (N. Car.), 95 Fed. Rep. 946.

16. **BILLS AND NOTES**—Accommodation Check—Bona Fide Purchasers.—A creditor accepting from his debtor a negotiable check given by a third person, and giving the debtor credit therefor in good faith, becomes a bona fide holder for value of such check, and may recover thereon against the drawer, although the check was given the debtor as an accommodation.—*RUTLAND PROVISION CO. v. HALL*, Vt., 44 Atl. Rep. 94.

17. **BOUNDARIES**—Accretions—Adverse Possession.—Where claimant's lands are separated from accumulated accretions by the land of another, however narrow the intervening strip may be, or whatever the size of claimant's tract behind it, the accretion does not belong to the claimant.—*SWERINGEN v. CITY OF ST. LOUIS*, Mo., 52 S. W. Rep. 346.

18. **CARRIERS**—Bill of Lading—Bona Fide Holder.—The rights of a bona fide holder, for value and without notice, of a bill of lading which stipulates for the delivery of the goods to the shipper's order at a designated point, with direction to notify A, will not be affected by a prior agreement or custom among the consignor, A, and the carrier to the effect that A, without the production of the bill of lading, should have the right to change the destination of the goods.—*WESTERN & A. R. CO. v. OHIO VALLEY BANKING & TRUST CO.*, Ga., 33 S. E. Rep. 821.

19. **CARRIERS**—Freight Charges.—The agent of one of defendant company's connecting lines granted an emigrant rate on goods not comprised within that classification in the joint tariff rates agreed on between the companies. The classification by the agent was in violation of 1 Supp. Rev. St. U. S. (2d Ed.) p. 686, forbidding false classification. Held, that defendant company was not bound by the agent's act, and could collect the full rate.—*ST. LOUIS, ETC. R. CO. v. OSTRANDER*, Ark., 52 S. W. Rep. 435.

20. **CEMETERIES**—Disinterring Bodies—Damages.—One who is the owner of the easement of burial in a cemetery lot, or who is rightfully in possession of the same, is entitled to recover damages from any one who wrongfully enters upon such lot and disinters the remains of persons buried therein.—*JACOBUS v. CONGREGATION OF CHILDREN OF ISRAEL*, Ga., 33 S. E. Rep. 853.

21. **CHATTEL MORTGAGE**—Constable's Return—Collateral Attack.—Where a constable's return on an order of sale in chattel mortgage foreclosure shows that cattle seized were the ones described in the order of sale, the parties to that suit cannot collaterally attack the return in an action against the constable and his sureties for seizing the wrong cattle.—*HOUSSELS v. PITTS*, Tex., 52 S. W. Rep. 558.

22. **CHATTEL MORTGAGES**—Deficiency Judgment.—A deficiency judgment, based on the return of a commissioner appointed to make a sale of mortgaged chattels under a decree of foreclosure that the property was covered by a first mortgage to its full value, is wholly unauthorized, as such commissioner is clothed with executive power only, and cannot judicially determine the value of the property, or that plaintiff is entitled to a deficiency judgment except by a sale of the property.—*REDLANDS HOTEL ASSN. v. RICHARDS*, Cal., 58 Pac. Rep. 152.

23. **CONSTITUTIONAL LAW**—Due Process of Law.—The provision of the fourteenth amendment to the constitution against depriving a person of his property with-

out due process of law is a prohibition upon the States, and not upon individuals; and a suit to enjoin a threatened taking of complainant's property, which it is alleged will be without any authority of law, does not involve a federal question.—*KIERMAN v. MULTNOMAH COUNTY*, U. S. C. C., D. (Oreg.), 95 Fed. Rep. 849.

24. **CORPORATION**—Agent—Power.—The power of a local or district manager of a corporation to collect in the ordinary way or by suit, if necessary, in the name of his principal, the demands of the company against debtors in his district, does not include the right to transfer any such demands to a third person, though for the purpose only of qualifying such person to sue on the same.—*RIGNY v. LOWE*, Cal., 58 Pac. Rep. 153.

25. **CORPORATIONS**—Contract With Director—Validity.—A contract made by a corporation with one of its directors, by which the latter was employed to settle claims against the company, and was to receive a commission on the bonds of the company used in payment, and whatever discount he could obtain on the claims, where it was made in good faith, and was not improvident, and has been performed, cannot be avoided, and the discounts recovered by a receiver subsequently appointed for the corporation.—*FR. PAYNE ROLLING MILL v. HILL*, Mass., 54 N. E. Rep. 532.

26. **CORPORATIONS**—Foreign Corporations—Transaction of Business.—P. L. 1896, p. 307, § 97, requires foreign corporations, before "transacting any business" in the State, to file with the secretary of State a certain statement as to its capital stock, etc., and designating an office in the State, and an agent on whom process against it may be served. Section 98 provides that, until the corporation so transacting business in the State obtains a certificate, it shall not sue in New Jersey on any contract made by it in the State. Section 101 imposes, under certain conditions, on a foreign corporation doing business in the State, certain taxes, fines, penalties, license fees, etc. Held, that a foreign corporation which makes a single sale of its product and accepts a guaranty of payment in New Jersey does not transact business, within the statute.—*DELAWARE & H. CANAL CO. v. MAHLENBROCK*, N. J., 43 Atl. Rep. 978.

27. **CORPORATIONS**—Statutory Liability of Stockholders.—The liability of a stockholder in a Kansas corporation to any judgment creditor of the corporation, created by the constitution and statutes of that State, is one arising upon contract; and an action for its enforcement is transitory, and, in the absence of a statute affecting the right, may be maintained in the courts of any State, or in any federal court, having jurisdiction of such matters and of the parties.—*WESTERN NAT. BANK OF NEW YORK v. RECKLESS*, U. S. C. C., D. (N. J.), 96 Fed. Rep. 70.

28. **COUNTIES**—Bridges—Liability of Adjoining Counties.—A county which causes a bridge to be constructed over a water course dividing it from another county cannot compel the latter to pay any portion of the expenses thus incurred unless the contract under which the work is done be made in the manner prescribed by law.—*FORSYTH COUNTY v. GWINNETT COUNTY*, Ga., 38 S. E. Rep. 562.

29. **CREDITORS' BILL**—Non Resident Partnership.—A court of equity can acquire jurisdiction of the non-resident members of a partnership, whose funds have been attached within the State, in a suit to subject the interest of one or more of the members of the firm to the payment of a claim due from him or them alone to a resident creditor, by publication, to ascertain the interest of the debtor partner, and apply it to the payment of the claim.—*GAINES v. FOURTH NAT. BANK OF NASHVILLE*, Tenn., 52 S. W. Rep. 467.

30. **CRIMINAL LAW**—Larceny After Trust.—When a corporation authorizes a person to receive money on its behalf from others, immediately upon the receipt of money so authorized to be collected a trust relation arises between the corporation and the person receiving the same; and, if such person fraudulently converts the money so received to his own use, he may be

indicted and punished under section 194 of the Penal Code, which prescribes the punishment to be inflicted for the fraudulent conversion by a person of money or other thing of value intrusted to him by another for the use and benefit of the "owner or person delivering it."—*HAUPT V. STATE*, Ga., 33 S. E. Rep. 831.

31. **CRIMINAL LAW—Murder—Instruction.**—An instruction that it is against all experience and reason to suppose that a man will imperil his own life, and inflict on another a brutal crime, without a motive, and in the mere wantonness of depravity, and that the question of motive is of great importance, when the question is as to whether defendant committed the crime, was properly refused, as involving a question as to the probative force of certain evidence.—*PEOPLE V. VERENESNECKOCKOCKHOFF*, Cal., 58 Pac. Rep. 156.

32. **DAMAGES—Breach of Contract—Mental Suffering.**—Mental anguish and distress alone cannot be the basis for a recovery of damages for a breach of contract.—*MCBRIDE V. SUNSET TELEPHONE CO.*, U. S. C. C., D. (Wash.), 96 Fed. Rep. 81.

33. **DECEIT—Evidence.**—An action of deceit cannot be supported by proof of damages resulting from the breach of a warranty, either express or implied. This is so for the reason that the action is one *ex delicto*, and such proof relates to a cause of action arising *ex contractu*.—*BROOKE V. COLE*, Ga., 33 S. E. Rep. 849.

34. **DEED—Bona Fide Purchaser.**—One who accepts from another a conveyance of land, with notice of the fact that a third person has an equitable interest therein, takes subject thereto.—*STONE V. GEORGIA LOAN & TRUST CO.*, Ga., 33 S. E. Rep. 861.

35. **DRAINAGE—Licenses.**—Where plaintiff's ancestor granted to a railroad company a right of way across his land, and as part of the consideration, the railroad company constructed its embankment so as to drain the land to the best advantage, plaintiff cannot compel the railway company to change its embankment because natural changes have made the drainage insufficient.—*HARRISON V. KANSAS CITY & A. R. CO.*, Mo., 52 S. W. Rep. 868.

36. **ESTOPPEL—Mortgages.**—Defendant conveyed land to his son, and subsequently, the deed not yet being recorded, asked permission to mortgage the land. The son consented, telling him to do whatever was necessary. Held, a consent that the defendant might represent himself as owner, and that the son was estopped to deny the validity of the mortgage.—*ALLEN V. EXCHANGE NAT. BANK*, Tex., 52 S. W. Rep. 575.

37. **EVIDENCE—Statement Made in Presence of Defendant.**—Where the issue in an action on a note is as to the execution of, and consideration for, the note, and it is shown that defendant took the money and walked away without saying anything, a statement made at the time by plaintiff, and in the presence of defendant, that he was loaning defendant the money which he was counting out to him, is admissible, under Code Civ. Proc. § 1870, which provides that evidence may be given of an act or declaration of another in the presence and within the observation of a party, and the conductor of the party in relation thereto.—*TIBBET V. SUE*, Cal., 58 Pac. Rep. 160.

38. **FEDERAL COURTS—Jurisdiction—Federal Question.**—Two things are necessary to the existence of a federal question which will confer jurisdiction on a circuit court of the United States: First, an actual dispute between the parties as to the meaning of some constitutional provision or law of the United States; and, second, materiality of the construction of such provision or law to a determination of the cause; and it is now well settled that these matters must appear from the plaintiff's statement of his own claim in the form required by good pleading.—*CALIFORNIA OIL & GAS CO. OF ARIZONA V. MILLER*, U. S. C. C., S. C. (Cal.), 96 Fed. Rep. 12.

39. **FEDERAL COURTS—Jurisdiction—Federal Question.**—A bill alleging that a patent for a mining claim was procured by defendant from the land department

by fraud, and without a compliance with the statute as to notice or proofs, and that it was issued without authority of law, and asking that defendant be decreed to hold such patent in trust for complainants, as the legal owners of the claim, states a cause of action necessarily involving the construction or effect of laws of the United States, of which a federal court has jurisdiction.—*CATES V. PRODUCERS' & CONSUMERS' OIL CO.*, U. S. C. C., S. D. (Cal.), 96 Fed. Rep. 7.

40. **FEDERAL COURTS—Jurisdiction—Federal Question.**—When the jurisdiction of a federal court is invoked on the ground that the suit arises under the laws of the United States, such facts must be alleged in the bill as to make it affirmatively appear to the court that the proper determination of the suit really and substantially involves a dispute or controversy as to the effect or construction of such laws.—*DEWEY MIN. CO. V. MILLER*, U. S. C. C., S. D. (Cal.), 96 Fed. Rep. 1.

41. **FRAUDULENT CONVEYANCE—Knowledge of Grantee.**—A conveyance by an insolvent bank, not made for the benefit of all its creditors and stockholders, to one who at the time of receiving the instrument either had actual knowledge of the bank's condition, or was chargeable with notice of its insolvency, is, under section 1979 of the Civil Code, void.—*CLARKE V. INGRAM*, Ga., 52 S. W. Rep. 802.

42. **FRAUDULENT CONVEYANCES—Preferences.**—Defendant, being in debt personally, and threatened by executions as a surety, transferred all his property, without regard to separate values, to his brother; he assuming, as consideration, all defendant's debts. The *bona fide* debts of defendant amounted to over \$1,000, while the value of the property was not more than \$1,000. Defendant's brother paid part of the debts, and became liable for the rest. The deed named the consideration as \$5,000, but this seemed to be only an estimate. The land was subsequently rented by the brother to defendant's son. Held that, in the absence of actual fraud, the conveyance would be sustained as a lawful preference.—*JOHNSON V. GOLESTON*, Tenn., 52 S. W. Rep. 474.

43. **FRAUDULENT CONVEYANCES—Preferences—Mortgage.**—Mortgages given by an insolvent debtor, covering all his property, to secure valid subsisting debts, if taken in good faith, are not fraudulent as to his other creditors, although the mortgagees knew he was insolvent and had no other assets.—*MCGREW V. HANCOCK*, Tenn., 52 S. W. Rep. 500.

44. **FRAUDULENT CONVEYANCES—Preferences.**—An insolvent debtor may in good faith prefer one creditor over others by an assignment of property.—*WARREN V. HINSON*, Tenn., 52 S. W. Rep. 498.

45. **GAMING—Wagering Contracts—Action to Recover Payment.**—Laws 1890, ch. 437, § 2, provides that whoever contracts to buy or sell securities or commodities upon credit or upon margin, "having at the time of the contract no intention to perform the same by the actual receipt or delivery of the securities or commodities and payment of the price," may recover in an action of contract from the other party to the contract, or from any person employed to so buy or sell on plaintiff's behalf, any payment made, or the value of anything delivered, provided the defendant had reasonable cause to believe that no intention to actually perform existed. Held, that in such an action the court was not required to go beyond the plain terms of the statute, and rule that plaintiff must prove a positive intention not to perform, but to make a wagering contract.—*DAVY V. BANGS*, Mass., 54 N. E. Rep. 536.

46. **GARNISHMENT—Liability of Trustee.**—When goods of a defendant have been laden on a ship by a steamship company, in the usual course of its business, for carriage to a distant port, at the time the company is served with trustee process, and the expense and delay attending the unloading of them will be as much as they are worth, the trustee cannot be required either to unload them, or at his own risk to transport

them to their destination, and return them to the port of shipment to answer the demands of the writ.—*VAN CAMP HARDWARE & IRON CO. V. PLIMPTON*, Mass., 54 N. E. Rep. 538.

47. **GARNISHMENT—Service—President of Bank.**—The president of a chartered bank being its *alter ego*, and therefore presumptively the official in charge of its affairs, an entry by a proper officer showing personal service on him of a summons of garnishment directed to the bank is *prima facie* evidence of lawful and sufficient service upon the corporation.—*THIRD NAT. BANK OF ATLANTA V. MCCULLOUGH*, Ga., 33 S. E. Rep. 848.

48. **GUARDIAN'S BOND—Release of Sureties—Estoppel.**—Where one holds funds as a guardian, he cannot, by giving a receipt from himself as trustee to himself as guardian, shift the liability of his sureties as guardian to his sureties as trustee, where there was no transfer of substantial assets.—*STATE V. BRANCH*, Mo., 52 S. W. Rep. 390.

49. **HUSBAND AND WIFE—Gifts.**—The rule that a married woman cannot acquire property by gift directly from her husband does not prevent the transfer of property by a husband to his wife through a third person, although the latter is a mere conduit for the passing of the title.—*BROWN V. BROWN*, Mass., 54 N. E. Rep. 532.

50. **INSURANCE—Forfeiture or Lapse—Waiver of Notice.**—Under the laws of the State of New York, which provide that no life insurance company doing business in that State shall have power to declare forfeited or lapsed any policy by reason of non-payment of premium or interest, or any portion thereof, until 30 days after the mailing of a written notice to the assured, a policy issued by an insurance company located in the State of New York, and doing business in another State, to be performed in New York, cannot be forfeited for non-payment of premium without a written notice to the assured, though the policy contains an express waiver of such notice.—*HARRINGTON V. HOME LIFE INS. CO.*, Cal., 58 Pac. Rep. 180.

51. **INSURANCE—Mortgage Clause—Change of Title.**—A fire insurance company may, in defense to an action against it by one for whose benefit a "mortgage clause" was attached to and made a part of the policy declared upon, set up the fact that the plaintiff violated a stipulation contained in such clause, non-compliance with which on his part rendered the policy void as to him.—*CONTINENTAL INS. CO. V. ANDERSON*, Ga., 33 S. E. Rep. 387.

52. **INSURANCE—Policy—Evidence of Parol Contract.**—In an action on a fire insurance policy written before, but not delivered until after, the property covered thereby was destroyed by fire, it is material for plaintiff to show an oral contract existing before the fire, and for that purpose any statements made by the agents of defendant while engaged in the transaction with the plaintiff, and up to the time the policy was delivered, are part of the *res gestae*, and competent; but declarations of such agents, made thereafter, when not acting in connection with the business with plaintiff, and which relate wholly to the past transaction, are hearsay, and their admission is error.—*CRAWFORD V. TRANS-ATLANTIC FIRE INS. CO.*, Cal., 58 Pac. Rep. 177.

53. **LIMITATION OF ACTION—Acknowledgment.**—A written acknowledgment of an existing debt in consideration of an extension of time of payment is sufficient to take the debt out of the statute of limitations.—*MARTIN V. SOMERVELL COUNTY*, Tex., 52 S. W. Rep. 566.

54. **MALICIOUS PROSECUTION—Probable Cause.**—To constitute probable cause which will justify the institution of a criminal prosecution, it is only necessary that there should be evidence which reasonably warrants a belief in the guilt of the accused,—it need not be sufficient to insure a conviction; and the fact that a prosecution is based on evidence or statements of an alleged accomplice is not sufficient to establish a want of probable cause.—*WIDMYER V. FELTON*, U. S. C. C., S. D. (Ohio), 95 Fed. Rep. 926.

55. **MARINE REINSURANCE—Validity of Contract.**—A policy of reinsurance, by which a company having power to issue reinsurance policies on marine fire risks undertakes to indemnify another company to the extent of one-half its losses by fire on marine risks it then holds or may thereafter take during the life of the contract, is not a wager policy, but is governed by the laws and usages of marine insurance, and is in the nature of an open policy, which, by such laws and usage, is valid; nor is its validity affected by the fact that it contains no stipulation for notice by the reinsured of the subsequent policies it issues.—*BOSTON INS. CO. V. GLOBE FIRE INS. CO.*, Mass., 54 N. E. Rep. 548.

56. **MECHANIC'S LIEN—Effect of Notice by Subcontractor.**—A notice given to trustees of a State institution by one who had furnished material to a contractor with such trustees for the erection of a building, that an amount is still due him for such material, and requiring the trustees to pay him any amount then due, or that shall thereafter become due, to the contractor, operates as a garnishment, and intercepts any payments which the contractor may then or thereafter be entitled to receive, but it does not affect a payment which previously became due, and has been transferred for value by the contractor.—*NEWPORT WHARF & LUMBER CO. V. DREW*, Cal., 58 Pac. Rep. 187.

57. **MECHANIC'S LIENS—Machinery.**—Where machinery is put into a building by the owner with the intention of making it a permanent part of the building, the person furnishing the machinery is entitled to a lien on the building, under Rev. St. 1889, § 6705; and it is wholly immaterial when the machinery is so put in the building,—whether at the time of its construction or afterwards.—*PROGRESS PRESS-BRICK & MACHINE CO. V. GRATIOT BRICK & QUARRY CO.*, Mo., 52 S. W. Rep. 401.

58. **MECHANIC'S LIEN—Right to File Cross Bill.**—The defendant, in a suit in equity brought by a subcontractor to enforce a mechanic's lien, has no right to file a cross bill making the principal contractor and its sureties parties to the suit, for the purpose of enforcing their liability on their bond given to secure performance of their contract.—*MORAE V. UNIVERSITY OF THE SOUTH*, Tenn., 52 S. W. Rep. 463.

59. **MORTGAGE—Purchase-Money Mortgage.**—A mortgage is a purchase-money mortgage, though not reciting the fact, where delivery of the deed to the mortgagor, and of the mortgage, are at the same time, and the money for which the mortgage is given is a part of the purchase-money paid for the property when the deed was delivered.—*COMMONWEALTH TITLE INSURANCE & TRUST CO. V. ELLIS*, Penn., 43 Atl. Rep. 1088.

60. **MORTGAGE SALE—Title—Purchaser.**—A mortgagee who purchases the mortgaged premises at a foreclosure under a power contained in the mortgage is entitled to possession, as against the mortgagor, during the year allowed to the latter for redemption.—*VAUGHAN V. WALTON*, Ark., 52 S. W. Rep. 437.

61. **MUNICIPAL CORPORATIONS—Contracts—Rescission.**—Where immediately after a municipality contracted with complainant for the purchase of a fire truck, it repudiated the contract and sent a written notice to that effect to complainant, who did not begin to manufacture the truck until after the receipt of the notice, complainant cannot recover its value, but only such damages as he had been subjected to at the time of the notice of disaffirmance.—*FIRE EXTINGUISHER MFG. CO. V. CITY OF CLARKSVILLE*, Tenn., 52 S. W. Rep. 442.

62. **MUNICIPAL CORPORATIONS—Defective Highways—Ice and Snow.**—Under St. 1896, ch. 540, relieving a city from liability for injury on a highway, caused by snow or ice, if the place was at the "time of the accident" otherwise reasonably safe, to entitle plaintiff to recover he must show not only that the place was not otherwise reasonably safe, but also that this fact contributed to the injury.—*NEWTON V. CITY OF WORCESTER*, Mass., 54 N. E. Rep. 521.

63. NATIONAL BANKS—Right to Sue Receiver.—The receiver of a national bank may be sued in a federal court in relation to a contract made by him on behalf of the estate in the course of its administration.—GILBERT V. MCNULTA, U. S. C. C., N. D. (Ill.), 96 Fed. Rep. 83.

64. NEGLIGENCE—Defective Highways—Proximate Cause.—The absence of a guard rail at a declivity on the side of a road, over which a team went without any contributory negligence of the driver, is the proximate cause of the accident, though the horse had become frightened and had kicked its leg over the wagon shaft.—BOONE V. EAST NORWEGIAN TR., Pa., 43 Atl. Rep. 1025.

65. NEGLIGENCE—Electric Light Company—Injuries.—The fact that an electric light company failed to properly insulate its wires where they passed over a building, or to place them so far above the roof that persons thereon would not come in contact with them, does not render it liable for an injury caused thereby to a lineman of a telephone company, merely because it had reason to expect that such linemen might go upon the roof of the building in the discharge of their duties, but it must be further shown that it had invited or licensed them to go there, before it owed them the duty of protecting them from the danger.—HECTOR V. BOSTON ELECTRIC LIGHT CO., Mass., 54 N. E. Rep. 539.

66. NEGLIGENCE—Injury to Child—Contributory Negligence.—A child only four and one-half years old is incapable of being guilty of contributory negligence.—CRAWFORD V. SOUTHERN RY. CO., Ga., 33 S. E. Rep. 826.

67. PARTNERSHIP SETTLEMENT—Validity—Impeachment.—Partners who have made a settlement of their accounts, in whole or in part, and reduced it to writing, are concluded thereby, and the courts will not disregard it, when it is free from fraud, duress, misrepresentation or concealment, or mistake of fact.—LAY V. EMERY, N. Dak., 79 N. W. Rep. 1053.

68. PRINCIPAL AND AGENT—Special Agent.—A special agent, authorized to sell shares of stock for cash only, has no authority to sell such shares on credit.—NORTON V. NEVILLS, Mass., 54 N. E. Rep. 537.

69. PRIVILEGE TAX—Notes—Securities.—Acts 1893, ch. 89, imposing a license tax on "security dealers" and persons "shaving notes," and Act June 14, 1895, imposing a privilege tax on "note shavers," do not apply to the purchaser of a judgment on a note for less than the face thereof.—MACE V. BUCHANAN, Tenn., 52 S. W. Rep. 505.

70. RECEIVERS—Suits by or Against.—A court of equity, which has undertaken to administer the estate of an insolvent corporation, and has taken possession of all its property through a receiver, may, in its discretion, reserve to itself the determination of all claims of or against the receiver, and the jurisdiction of a federal court in such a case to entertain a suit by its own receiver for the enforcement of a claim is not dependent on the citizenship of the parties, or the amount in controversy.—BOWMAN V. HARRIS, U. S. C. C., W. D. (Ark.), 95 Fed. Rep. 917.

71. RELEASE—Legatees—Executors.—Where a legatee releases the executor from liability for his full share of the estate, and of all claims, suits, and accounts relating thereto, it covers his entire interest, and not merely the interest shown by the accounts of the executor filed up to date.—IN RE HERTZLER'S ESTATE, Penn., 43 Atl. Rep. 1027.

72. REMOVAL OF CAUSE—State Real Party.—Under Rev. St. § 2653, authorizing actions by the board of railroad and warehouse commissioners against railroads charging excessive rates, and imposing a penalty on them, the commissioners are merely formal parties, the real party being the State, and the action is consequently not removable to a United States court, though the defendant is a citizen of another

State.—HICKMAN V. MISSOURI, K. & T. RY. CO., Mo., 52 S. W. Rep. 351.

73. RES JUDICATA.—Plaintiff had twice sued defendant for nuisance caused by the shaking of his premises by the operation of huge engines on defendant's premises, the escape of steam, and the noise, alleging that because thereof he was unable to rent his premises. Defendant averred that the premises were uninhabitable because of failure of plaintiff to repair. In both cases judgments were rendered for defendant. Thereafter plaintiff sued, alleging that he had thoroughly repaired, and that defendant had constructed water tanks, and that they overflowed, in addition to the other former injuries, rendering his premises uninhabitable. Held, that the judgments in the former cases were not *res judicata* as against plaintiff.—AM RHEIN V. QUAKER CITY DYE WORKS, Penn., 43 Atl. Rep. 1008.

74. TAXATION—Power of State Auditor.—The power conferred upon the auditor of state to remit taxes does not authorize him to reduce a valuation of real estate made in pursuance of law by a local board of equalization, merely because he believes the valuation to be excessive.—BLACK V. HAGERTY, Ohio, 54 N. E. Rep. 527.

75. TAX SALE—Obligation of Contracts—Constitutional Law.—A purchase at a tax sale is a contract. It is made upon the statutory assurances then given to the purchaser, and no subsequent statute can sweep away these assurances without impairing the obligations of the contract.—ROBERTS V. FIRST NAT. BANK OF FARGO, N. Dak., 79 N. W. Rep. 1049.

76. TRESPASS TO TRY TITLE—Inclosure of Land—Rents.—Where defendant, in fencing land belonging to him, inclosed various tracts belonging to plaintiff, and used the entire enclosure for pasturage, he is liable for the reasonable rental value of plaintiff's land so used, in trespass to try title, though he never disputed plaintiff's title or right to possession.—HASTINGS V. O'CONNOR, Tex., 52 S. W. Rep. 567.

77. USURY—Bill to Recover.—A bill setting out notes on which usury is claimed to have been paid, and the amount of the usury paid thereon, and alleging that there were other notes, the exact date of which complainants did not have, and that the amount of usury paid thereon could not be accurately stated, and as to which defendant was called on for a discovery, is sufficient as to its allegations of amount of usury.—BRUQUO V. BANK OF ERIN, Tenn., 52 S. W. Rep. 775.

78. WAREHOUSEMAN—Sale of Goods for Storage Charges—Notice.—The want of knowledge of a warehouseman of the address of the owner of goods stored will not excuse the failure to give such owner notice of a sale of the goods for storage charges, where the foreman in charge of the warehouse when the goods were stored was given the address, and requested to note it on the books, which was not done.—STEWART V. NAUD, Cal., 53 Pac. Rep. 186.

79. WILLS—Construction—Beneficiaries.—Where testatrix devised property to a sister, "and, if she be dead, to her children," and the sister and a child of hers died thereafter, but before testatrix, children of the deceased child who were living when the testatrix died did not take under the will, since a will speaks from the testator's death, and the word "child" means immediate offspring.—GRANT V. MOSELY, Tenn., 52 S. W. Rep. 508.

80. WILLS—Construction—Property Devised In Trust.—The language of a will must be construed with reference to the time of the testator's death; and in a will providing for the distribution of the income from trust property, and on the happening of a certain contingency the corpus of such property, among the testator's children, "the issue of any deceased child taking by representation the share which his, her, or their parent would have taken if living," the words "deceased child," in the absence of language indicating a contrary intention, refer only to a child dying before the testator.—PATTON V. LUDINGTON, Wis., 54 N. E. Rep. 1073.